

C.D. Howe Institute

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Summary

The economy and the Constitution meet in Canada at several junctions. On the nation's business list, the intergovernmental debate about reform of the Constitution has taken priority over management of the economy during the past three years. When selected economic problems, such as energy policy, have been dealt with, hostilities between governments, analogous to those witnessed in the constitutional debate, have hampered resolution. On the constitutional agenda, important determinants of Canada's economic structure have been the subject of negotiations on possible constitutional amendments. These negotiations, in turn, failed because of profound disagreement about the regional equity of the present structure and, correspondingly, about the respective authority for government intervention that should be left to the federal and provincial levels.

Fundamentally, the economy and the Constitution meet in Canada in the struggle for power that pits the center against the regions; the industrial heartland against a hinterland more reliant upon primary production; and populous, electorally influential Ontario, in company with the federal government, against other provincial governments. The conflict is over country-building pursued from a perspective and in a form that offend and provoke the pursuit of individual "province-building" or, conversely, over province-building and its ill effects on national economic integration and, potentially, on national unity.

The federal government's proposed Resolution to patriate and amend the Constitution, which awaits a Supreme Court ruling as this is written, fails to settle the basic argument and may have added fuel through both content and unilateral sponsorship. While the Resolution would appear to serve the interests of country-builders

and temporarily thwart the quest by province-builders for greater decentralization of legislative authority, it promises to do nothing to inspire change in the motives or methods of either side. Furthermore, insofar as reform of federal government institutions — to improve regional representation — could substitute for decentralization of power, the Resolution may foreclose a prime remedy by the provision for a Senate veto on any future constitutional amendments. As a consequence, the constitutional debate can be expected to continue, and the clash between protagonists to remain a serious obstacle to the cooperative solution of Canada's economic problems.

Where the Economy and the Constitution Meet in Canada

Many Canadians have begrudged all the fuss over the Constitution during the past several years. Except as discussion of the matter may have helped to win the referendum in Quebec, the preoccupation with constitutional reform is thought to have needlessly diverted government attention away from the country's economic condition, which is felt to be of far more pressing and practical concern. In those rare instances where important national economic matters, such as energy policy, have been addressed, progress has been noticeably hampered by intergovernmental hostilities, presumed to be a fall-out from the simultaneous constitutional exercise. Most now hope that a ruling by the Supreme Court of Canada on the federal government's Resolution¹ will bring a quick end to the constitutional debate and, with it, reinstatement of the economy as the top government priority and a return to more cooperative federalism in Canada.

Although such an outcome remains a possibility — and is confidently forecast by people who liken our constitutional wrangle to the Canadian flag debate of the 1960s — evidence culled from the constitutional proceedings and presented here fails to support this prospect. Instead, the evidence foreshadows a situation in which the Constitution will continue to vie for attention on the nation's agenda and intergovernmental relations will remain combative.

In fact, the constitutional talks *have* dealt with economic issues — not with inflation, the dollar, or labor shortages but with some key determinants of the country's economic structure. These particular

¹ "Proposed Resolution for a Joint Address to Her Majesty the Queen Respecting the Constitution of Canada," in *House of Commons Debates*, October 2, 1980. The key amendments that shaped the final form of the Resolution came in a "Motion Tabled in the House of Commons by the Minister of Justice" (in *House of Commons Debates*, February 13, 1981) and in a "Notice of Amendment to Government Business," released by the Office of the Prime Minister on April 21, 1981.

negotiations reveal clearly why — even if the debate on the Constitution were abruptly terminated — practical economic matters that require the joint efforts of both levels of government would continue to encounter much the same kind of obstacles as have been witnessed in energy policy.²

The constitutional debate itself is not the problem. Rather, in both substance and process, it is an exhibition of the problem, which, in bald terms, is a profound disagreement over how, if at all, the distribution of power should be rearranged between governments — and among people — in Canada. A corollary to the problem is the manner in which that power is wielded. Federal-provincial conferences on the Constitution, and the like, represent an attempt to settle the dispute by negotiating direct amendments to the constitutional law for those institutions and fields of power that are most in contention.

If it works, this firsthand approach to the problem has the potential to produce a stable balance of power and a truce in inter-governmental relations that would be conducive to much smoother resolution of national issues. Otherwise, the individual protagonists in the disagreement are bound to satisfy their basic constitutional ambitions by more tangential and piecemeal techniques, notably by legislative or financial forays into coveted borderline fields of jurisdiction.³ The boldest of such attempts are met with court challenges that, almost irrespective of specific outcome, can make the problem worse. Indeed, reciprocal behavior of this sort in the past is responsible, at least in part, for the problem having reached very serious proportions.

The recent constitutional exercise has not worked, however. Perhaps to an unprecedented degree it has exposed, and has focused attention on, the underlying sources of internal conflict in Canada. The record also shows, however, that these sources of conflict have not been removed to any significant degree by the federal government's Resolution and that, in some ways, they will have been aggravated — by what the patriation package does and does not contain and by the unilateral procedure adopted.

Accordingly, if the Resolution should happen to clear the Supreme Court of Canada intact and receive passage by the Parliaments of Canada and Britain to become constitutional law, it is

²For a review see Wendy Dobson, *Canada's Energy Policy Debate*, Observation No. 23 (Montreal: C. D. Howe Institute, 1981).

³Federal "intrusions" into areas of provincial jurisdiction have been documented periodically since 1977 by the Western Premiers' Task Force on Constitutional Trends.

doubtful that the eight provincial governments that have opposed it would accept defeat and, chastened, turn their attention elsewhere. At the very least, they could be relied upon to make full use of the required annual conferences of First Ministers during the subsequent two-year period prescribed in the Resolution (for finalization of the constitutional amending formula) to resume bargaining. In addition, that eventuality could launch provincial referenda or elections and, possibly, refusals to revamp provincial legislation to comply with the Canadian Charter of Rights or other forms of resistance to provisions of the Resolution.

If, at the other extreme, the Supreme Court finds the Resolution wholly beyond the prerogatives of Parliament alone, federal-provincial negotiations on the Constitution might not be resumed for some time — accepting that there could be some reluctance on the part of the federal government to return to the table. This would only drive the essential problem back underground and add to the pressures for constitutional reform.

Across the full spectrum of possible decisions by the Supreme Court, there lies a single probability: that we have not heard the last of the constitutional debate. This Observation is intended as a documentary on the negotiations of the past three years and a guide to future talks. The paper reviews the substance of the intergovernmental debate, particularly with respect to the economic agenda items, highlights and examines the important issues that emerged and that remain largely unresolved, and identifies other, potentially fruitful responses to the problem.

In the first section a brief preview of the issues is presented. The second section places the debate within the overall framework of the still critical "national unity crisis" and the mores of contemporary intergovernmental relations. In the third section the constitutional agenda as a whole is introduced. This is followed by sections on the economic rallying points of each side in the constitutional debate: resources and the economic union, respectively. The sixth section deals with the issue of regional economic redistribution, an obstacle to agreement on the two key items that was also the object of separate attention. The seventh section interprets the findings and sets the stage for the final section of the paper, which offers a few prescriptions for further or fresh consideration in the debate.

Preview of the Issues

Canada's federal system of government gives all citizens direct representation at both the provincial and the federal levels. The

respective powers of each level are defined by the body of constitutional law that has as its basis the British North America Act. This allocation is ever-changing as old words take on new meanings owing to expansion of the role of government at both levels, as judicial interpretation adds clarity (or more confusion), as parts fall into disuse, and as amendments are made. Although the text of the BNA Act has not changed very much in 114 years, the effective assignment of power has. Experts generally conclude that over time there has been an expansion in the authority of provincial legislatures relative to what it was in 1867. Conventional wisdom holds further — although it may be more apparent than real — that provincial power has also grown relative to federal power and that the authority of Parliament has been diminished by comparison and even eroded in absolute terms.

At the heart of the constitutional debate is the heavily value-laden question of whether a realignment of power toward the provinces may have gone too far, not far enough, or to a point that is now just about right. Positions therefore vary on the need for immediate constitutional reform, on the extent of reform required, and on whether changes should be designed, on balance, to redress, accommodate, or halt the decentralization of power. These positions find concrete expression in every aspect of the exercise, notably in the configuration of the constitutional agenda, in the individual amendments proposed or rejected, and, of course, in the heat of the argument.

The conventional view of power sharing under a federal system is reflected in the BNA Act, with distribution on the basis of subject headings — one level receiving international trade, the other receiving education, and so forth. This can be imagined as a vertical division of powers. Lately, however, political scientists have pointed out that such a division is becoming outmoded because of the growth and increased complexity of government activity. It is being adjusted, if not entirely replaced, by a horizontal division of powers that, in the end, would give each level of government a certain function common to every sphere of public policy.⁴

The constitutional negotiations showed not only the application of the newer method of allocation but also a fundamental disagreement about where, between the federal and provincial levels, the horizontal dividing line for "national policy" and determination of

⁴ An exposition of this new "philosophy of federalism" was given by Dr. Audrey Doerr of Simon Fraser University in an address to the Canada West Foundation conference held in Banff on November 28-30, 1980.

the "national interest" should be drawn. The federal government lays claim to that tier of responsibility virtually by definition as the national government, the only one among the eleven senior governments that is accountable to all voters in Canada. Provincial governments challenge the exclusivity and supremacy of the federal role partly on the ground that all provinces and regions should have an equal voice in national matters but are not equally represented in the House of Commons or in the composition of elected federal governments. Similarly, the national character of such federal institutions as the Supreme Court is called into question.

Other contentious issues also stem from doubts about the representative nature of the federal government as contrasted with the model of equality among provinces — symbolized by provincial representation at the meetings. Chronic complaints resurface from eastern and western Canada about the inequity of the heartland-hinterland structure of the national economy, which is seen to mirror the profile of electoral interests at the federal level. The individual efforts of provincial governments in the hinterland to achieve a counterbalance are attacked and defended. As a consequence, the issue of regional economic redistribution asserts itself repeatedly, in different forms.

Thus three main themes are woven into the debate: the distribution of power between the federal and provincial levels of government, the locus of national authority in Canada, and the regional economic structure.

The Framework of the Debate

The "national unity crisis," heralded by the election of the Parti Québécois in 1976, brought forth several useful concepts of the problem that still confronts Canada.

According to Albert and Raymond Breton, the unease and tensions that mark contemporary Canadian society are rooted in "a conflict over the distribution of organizational power — that is, over the distribution of the means and instruments of political, social and economic betterment."⁵ The Bretons identify linguistic and regional cleavages as the dominant barriers to a redistribution of power, as the "frontiers" across which aspirants are pitted against those who now hold power. They conclude that, unless and until these barriers are lowered significantly, to allow satisfaction of

⁵ Albert Breton and Raymond Breton, *Why Disunity? An Analysis of Linguistic and Regional Cleavages in Canada*, 1978 Dal Grauer Memorial Lectures, University of British Columbia (Montreal: Institute for Research on Public Policy, 1980), p. 81.

the demand for organizational power, "the forces of disunity will continue to progress."⁶

Within the same school of thought is a view of the underlying forces conveyed by Jeff Evenson and Richard Simeon in the intuitive phrase, "country-building versus province-building" — versus also the hybrid "Quebec nation-building."⁷ They trace how Canada's history has been shaped by "interplay and tension" between these three "dynamics" or "drives," each with its own strong institutional base. Although country-building has found different expression from time to time, certain characteristics have been maintained:

The federal government and national institutions are seen to be the chief instruments of national development. Problems are defined nationally and solutions are given in national terms. The need to maintain a Canadian common market is stressed throughout, as is the need for a national standard level of public services and national leadership in the development and implementation of social policies. The federal government is seen as the primary vehicle through which to maximize overall economic growth, to create and promote the development of complementary regional economies and to distribute political costs and benefits in a nationally advantageous manner.⁸

Juxtaposed with this has been province-building, "based on a strong sense of regional community and identity backed by the wealth of provincially owned resources and driven by the desire of provincial societies to develop unhindered according to their own needs and priorities."⁹ Evenson and Simeon assert that province-building has gathered strength partly in resistance to the effects of country-building in the mode described above, "fuelled by grievances and frustration at unfair federal policies and unrepresentative national institutions."¹⁰ Thus the growing clash between these two forces is seen to have origins in the "institutional failure of the federal government to effectively develop support across all regions, to reflect *within itself* Canada's regional diversity, and to serve as an arena for the accommodation of regional interests."¹¹ (Or, as the

⁶ *Ibid.*, p. 82. Constitutional change is seen as one (but not the only) means by which to facilitate or induce a change in the distribution of organizational power that would ease tensions.

⁷ Jeff Evenson and Richard Simeon, "The Roots of Discontent," paper presented to the Workshop on the Political Economy of Confederation, sponsored by the Economic Council of Canada and the Institute of Intergovernmental Relations, Queen's University, Kingston, Ontario, November 8-10, 1978.

⁸ *Ibid.*, p. 6.

⁹ *Ibid.*, p. 10.

¹⁰ *Ibid.* National institutions here include federal political parties and all the other tiers (caucus, the Cabinet, and so forth) where regional "brokerage politics" would ideally be conducted.

¹¹ *Ibid.*, p. 7 (emphasis added).

Bretons would say: because the regions have been barred from sharing organizational power wielded at the center.)

Quebec nation-building has similar roots in the disadvantages suffered historically by French Canadians in the national political system — although, as Evenson and Simeon note, underrepresentation has been corrected at the ministerial level in governments led by Prime Minister Trudeau and at the public service level through the bilingualism program.¹² However, the drive for greater autonomy and self-determination also exists in its own right, so that even if such inequities are redressed,

a highly self conscious people, united by a common language, a common historical experience, an elaborate network of social institutions, and with institutional resources provided by control over a provincial government, might wish to achieve sovereignty and so become a complete "nation-state."¹³

Notwithstanding the May, 1980, referendum result, it remains to be seen whether French Canadian nationalism can be accommodated within the federal system.

Because this paper concentrates on the *economic* dimensions of constitutional reform, only the related concepts of province-building versus country-building and regional cleavages are carried forward. The unique linguistic and cultural features that distinguish "Quebec nation-building" from general province-building are suppressed, and as a result, Quebec tends to be treated more "comme les autres" than could be justified in a more comprehensive examination of the constitutional debate.¹⁴

Province-Building versus Country-Building

Inherently, province-building and country-building may not be mutually exclusive, but the two pursuits "are not compatible, at least in their present forms. They lead inevitably to federal-provincial clashes over national policy."¹⁵

Foremost among the reasons frequently cited for this incompatibility is that country-builders tend, whether consciously or not, to take "a heartland-hinterland view of Canada"¹⁶ — which not only

¹² *Ibid.*, p. 24.

¹³ *Ibid.*

¹⁴ For detailed analyses that focus directly on Quebec, see the 14 volumes in the C. D. Howe Institute's "Accent Québec" series of publications.

¹⁵ Judith Maxwell and Caroline Pestieau, *Economic Realities of Contemporary Confederation*, Accent Québec series, No. 14 (Montreal: C. D. Howe Research Institute, 1980), p. 83.

¹⁶ A succinct account of how the heartland-hinterland concept has been applied to the West is given by Donald Smiley as follows:

coincides neatly with the federal electoral map (where Metro Toronto alone contributes 23 seats to the House of Commons, compared with 76 from the whole of the West) but also finds justification in the doctrine of economic efficiency strictly applied at the national level. Province-builders, appropriately enough, have a different concept of their domain and face a correspondingly different set of political and economic imperatives.

It follows that, *in its present form*, country-building will be centralist in approach. In the Canadian context this term takes on a special meaning. Legislative powers would not only gravitate toward the central — that is, the federal — government or, at least, away from the provincial governments, as with an entrenched Charter of Rights. In addition, the center of the country — as defined by its history, demography, and even geography — would continue, as the proverbial "heartland," to dominate the nation's political economy. By contrast — and partly in retaliation — province-building is centrifugal in approach. A devolution or decentralization of constitutional powers is sought to enable greater self-fulfillment of the economic, social, and cultural aims expressed at the provincial level that are expected to be discounted or compromised at the national level. Moreover, province-builders want to secure a formal and continuing say in how acknowledged federal powers are exercised.

With a few refinements, this framework provides the basis for the script performed during the last round of federal-provincial talks on the Constitution, particularly at the First Ministers' con-

Western Canada was from the first and to a considerable extent remains an economic colony of the country's central heartland. The acquisition and subsequent development of a western hinterland was one of the central purposes of Confederation and in the early years of the Dominion and afterward relations between the heartland and the hinterland were regulated according to classic mercantilist principles: a. metropolitan policies required the hinterland to buy the manufactured goods of the heartland; b. capital development in the hinterland was carried out mainly by the activity of public and private institutions centred in the heartland; c. the hinterland and the heartland were physically linked by transportation and communication facilities established and operated for the benefit of the latter; d. in international economic relations, the interests of the hinterland were usually sacrificed to those of the heartland; e. many of the critical aspects of hinterland development were carried out through the instrumentalities of large business organizations protected by heartland policies from foreign or hinterland competition; f. there was a continuing pattern controlling the political authorities of the hinterland in the interests of the heartland through the workings of the national political parties, reservation, and disallowance of provincial legislation, etc.

(Donald V. Smiley, "The Political Context of Resource Development in Canada," in Anthony Scott, ed., *Natural Resource Revenues: A Test of Federalism* [Vancouver: University of British Columbia Press for the British Columbia Institute for Economic Policy Analysis, 1976], pp. 65-66.)

ference in September, 1980 — and as subsequently adapted in the energy policy conflict. Adjustments are required to better develop the characters who play the respective roles.

The first refinement has to take account of Ontario. Why has there not been a great clash in relations between that province and the federal government, given that, "contrary to recent . . . mythology, Ontario rather than Quebec has been since Confederation the most consistent defender of provincial autonomy"?¹⁷ Either Ontario has been temporarily truant from the school of province-building or it represents the one constituency in Canada today where the present forms of province-building and country-building are not necessarily incompatible. The latter is the more likely explanation. The people of Ontario dominate Canada in terms of population concentration, so that any form of country-building must generally afford them comfortable political accommodation. And, in terms of the industrial structure of the nation, Ontario, especially southern Ontario, is Canada's heartland and therefore stands to benefit from national economic policies that embody the heartland-hinterland concept.¹⁸ Quite simply, Ontario can have the best of both worlds. Oddly enough, Ontario thus provides a glimpse of federalism in the finest sense at work, where the people are fully represented by both levels of government, with each acting in their interests to reinforce the other (rather than at cross-purposes).

The second refinement is that province-builders profess a certain egalitarianism, albeit with distinct overtones of Horatio Alger. In their view each of the provinces should be accorded the same fighting chance to realize its own potential, to grow or prosper more or less independently of the others. This is generally taken to mean, by the rest, that Ontario would lose its hitherto privileged status in Confederation.¹⁹

Symbolic of this egalitarianism is the federal-provincial ministerial conference itself, which in recent years has been unofficially elevated to the level of an institution of government in Canada.²⁰

¹⁷ *Ibid.*, p. 68.

¹⁸ Ontario may currently feel compelled to bolster this common purpose, either because it sees some prospect of the heartland-hinterland concept finally being replaced in the mind of country-builders for another concept less favorable to the province or because the concept — and the reality — may become seriously undermined as a result of a shift in economic activity and economic influence toward resource-rich parts of the hinterland. The former change is unlikely to occur spontaneously, but the latter is under way.

¹⁹ It is significant that the obverse is not sought, which is to say that the other provinces would strive to obtain for their citizens the same enjoyment of federalism.

²⁰ Recognition and acceptance of this evolution are demonstrated by the numerous

In this forum each province has an equal voice at the table. Efforts are sometimes made to render the federal spokesman an equal too, but these can rarely succeed beyond acceptance of signal phrases such as "First Ministers" and "senior governments" because the federal spokesman usually has the power of the chair and a great deal of influence over the agenda and, in all likelihood, can win the day simply by saying "no" to the other ten.

Finally, it should be added that, in the real world where this script is acted out, province-builders may, on occasion, appear in the shape of federal Prime Ministers or Cabinet Ministers, Members of Parliament or Senators, or federal public servants. Conversely, country-builders may be found among provincial Premiers, even outside Ontario, and so on. While it may seem easy enough to tell just who is on either side among the current cast of characters, this probably has more to do with the *present forms* of province- and country-building, and the melodramatic heights that have been reached, than with the roles of province-builder and country-builder being somehow inherently monolithic or mutually exclusive, one doggedly played by provincial governments, and the other by the federal government, with Ontario featured in both parts.

It is possible to argue this in terms of their programs too. For example, the federal government's country-building program of equalization payments to "have-not" provinces also helps to foster provincial development — recognizing, however, that recipient provinces may resent their dependency on the benefactor, given that province-building, on their own terms, is pursued with the very aim of self-reliance. Alternatively, Alberta's program of loans to other provinces from its Heritage Savings Trust Fund has an element of country-building, in the same way as a family unit is strengthened when one member comes to the aid of another.

Despite some interchangeability between the two roles for actors and programs, there is little evidence to suggest that, in the best of all possible worlds, province-building and country-building can be fully complementary. The vision of Canada as a "community of communities" held by the former government of Prime Minister

proposals that have been made to enshrine the federal-provincial conference, of First Ministers at least, in the Constitution. One such proposal was contained in the Victoria Charter of 1971 and in the Constitutional Amendment Bill (C-60) of 1978. Indeed, it is striking that the Resolution makes no similar provision, since the idea has heretofore aroused no controversy among governments — although various Members of Parliament have complained from time to time that federal-provincial conferences reduce the accountability of governments to Parliament and to legislatures.

Clark and Alberta's stated belief that "strong provinces make a strong, viable Canada, complementing the role of a strong federal government"²¹ have only hinted of the promise.

The current conflict, as noted above, occurs because the blueprint for country-building embodies and perpetuates the heartland-hinterland view and thus fails to comply with contemporary provincial aspirations, except those of Ontario. Because province-building is, to some incalculable extent, conducted in pure resistance to this attitude, however, it probably takes a more exaggerated form these days than would otherwise be the case or than would be possible to sustain over the longer term within the federal system as Canadians have known it.

The Constitutional Agenda²²

When the First Ministers last met in open session to discuss the Constitution — in September, 1980 — they had before them an agenda consisting of twelve items, listed in Table 1. This rather small number, in itself, suggests something interesting. No matter how broadly the topic headings are defined, the governments apparently did not address themselves to comprehensive constitutional change; the object, at least at that stage, was *not* a massive overhaul of the BNA Act — or even to bring a wide range of government activity under scrutiny — but, instead, selective reform.²³ To the extent that the selection had been mutually agreed upon during the First Ministers' private meeting in June, 1980, these twelve items would have been considered adequate to represent the respective government interests at stake and to embody the fundamental issues — which most Premiers felt had to be resolved before

²¹ Government of Alberta, *Harmony in Diversity: A New Federalism for Canada* (Edmonton, 1978), p. 3.

²² This section draws on conference materials — position papers, draft legal texts of amendments, transcripts of statements, and the like — released to the public through the auspices of the Canadian Intergovernmental Conference Secretariat (CICS) in Ottawa and on the conference proceedings as seen through the eyes of seasoned "watchers" of the constitutional debate. For an analysis of every item on the agenda from the viewpoints of province-building and country-building, see Richard Simeon, *A Citizen's Guide to the Constitutional Question* (Toronto: Gage for the Business Council on National Issues, 1980).

²³ Generally speaking, proposals for constitutional change that have come from outside government have been more comprehensive and more concerned with the entire scope of government activity in its detail. See, for example, Quebec Liberal Party, Constitutional Committee, *A New Canadian Federation* (Montreal, 1980), which addresses, *inter alia*, education, immigration, health, social insurance, agriculture, banking, transportation, and even postal service (which would remain under federal jurisdiction).

TABLE 1

Classification of the Constitutional Agenda, 1980

<i>Province-Building</i>	<i>Country-Building</i>
Resource Ownership and Interprovincial Trade	Patriation and Amending Formula
Communications	Charter of Rights ^b
Family Law	Supreme Court
Fisheries	Equalization and Regional Disparities
Offshore Resources	Powers over the Economy
Senate "New Upper House Involving the Provinces"	Preamble/ Principles (Monarchy)
(Spending Power) ^a	
(Indirect Taxation)	
(Declaratory Power)	

^a Items in parentheses were on the agenda in February, 1979, but not in 1980

^b Universally applied

patriation, especially if patriation were to be accompanied by a Charter of Rights.

The agenda had narrowed from the list of items under discussion nineteen months previously, during the First Ministers' conference in February, 1979. The focus of the agenda had also shifted. Either or both of these changes might be traced to events in the interval, which included the election and defeat of the Conservative government in Ottawa, the Quebec referendum, and the election of Premier Angus MacLean in Prince Edward Island and of Premier Brian Peckford in Newfoundland.

Four items from 1979 had since been dropped or otherwise disposed of: (federal) Spending Power, Indirect Taxation, (federal) Declaratory Power, and the Monarchy. Two new items had appeared: Powers over the Economy and the Preamble/Principles. The strategic reasons for these changes remain partially shrouded in the usual mystery that surrounds federal-provincial relations. It may be significant, however, that, of the four subjects dropped, the first three would have resulted either in constitutional limitations being placed on the exercise of existing federal authority or in enlargement of provincial authority — according to the so-called "best effort" draft amendments formulated in 1979 as the joint

products of the federal and provincial government delegations.²⁴ In terms of the framework developed above, these items had been directed toward province-building. Of the two items added, Powers over the Economy tends to promote country-building, and the other, being a statement of principles, conceptually could go either way. It is therefore probably fair to say that in nineteen months the agenda had shifted on the margin in favor of country-building. When the items that were carried forward from 1979 are also sorted according to this taxonomy, there is evidence of such a shift for the agenda as a whole, as Table 1 indicates.

Admittedly, some rather sweeping judgments have been made in order to place the individual items in one column or the other of Table 1. No subject heading is purely of the province-building or country-building kind. For instance, as alluded to above, the principle of equalization supports both notions. Nonetheless, because the object of equalization payments has been to ensure a potential for uniform delivery of essential public services across the country (in the face of inequalities in provincial fiscal capacity), national standardization is an inherent theme; as a consequence, equalization is more in the nature of country-building. The overall character of the constitutional item remains the same, even when coupled with the aim of reducing regional disparities, inasmuch as the removal of these disparities need not necessarily imply regional economic development and, even when the latter aim is pursued directly, the federal seed money for economic advancement in the poorer

²⁴ *Spending Power*: Alternate draft texts discussed under this item were all designed to specify the conditions under which the federal government would be permitted to make expenditures in fields under provincial jurisdiction.

Indirect Taxation: A federal proposal under this item would have granted the provinces general access to the field of indirect taxation, subject to certain conditions. While this was dropped, a draft amendment was discussed under the item on Resource Ownership and Interprovincial Trade.

Declaratory Power: A "best effort" draft amendment would have placed restrictions on the exercise of Section 92 10(c) of the BNA Act, whereby Parliament may now take jurisdiction over "works" declared to be "for the general advantage of Canada, or for the advantage of two or more of the provinces", the purposes of any declaration would have had to be expressly indicated by Parliament, a prescribed procedure for consultation with the provinces would have had to be followed, and, most significantly, where the work in question was for resource production, prior consent would have had to be obtained from the government of the province where it was located. While this was scrapped as a full-fledged item, the Declaratory Power was discussed in very general terms, as had been done earlier, under the item on a reformed Senate.

The fourth item dropped, the *Monarchy*, had been placed on the agenda in the midst of controversy surrounding the provisions of Bill C-60 — the constitutional reform package introduced in Parliament in June, 1978 — and had been disposed of by mutual consent of the First Ministers in February, 1979.

provinces is granted according to priorities and designs acceptable in Ottawa.

Assignment in Table 1 is even more difficult because each subject heading embraces a variety of actual proposals and negotiating responses that also run the gamut from province-building to country-building and usually contain elements of both. In the case of seacoast fisheries, for example, the "best effort" draft that formed part of a provincial consensus in 1980²⁵ provided for the now exclusive jurisdiction of Parliament to be shared in a specified way with provincial legislatures. The federal government responded by rejecting outright any diminution of its authority — because, after all, "fish swim" — and by offering instead much closer consultations with the coastal provinces in management of the fishery and a constitutional amendment to that effect.²⁶ Considering the general thrust of the proposals made by those advocating change, this item is classified as one of the province-building kind.

Being two-dimensional, Table 1 lacks the important element of degree — the extent to which any particular item (and the most far-reaching proposals thereunder) tends to promote either notion. There can be no doubt, however, that among the economic items each side had its *cause célèbre*. For province-builders it was Resource Ownership and Interprovincial Trade — particularly when allied with the principle of equal treatment for onshore and offshore mineral resources.²⁷ For country-builders it was the "economic union," which dominated federal proposals under the Powers over the Economy item. Each of these two items will now be examined in turn.

Resources

Underpinning the various proposals made by provincial governments since 1978 for the amended treatment of natural resources under the Constitution is their felt need to have what are considered

²⁵ According to the Federal-Provincial Conference of First Ministers on the Constitution, Ottawa, September 8-12, 1980, "Proposal for a Common Stand of the Provinces: Quebec" (Ottawa: CICS, Document 800-14/085).

²⁶ Federal-Provincial Conference, 1980, "Notes for a Statement by the Prime Minister of Canada on Fisheries" (Ottawa: CICS, Document 800-14/054).

²⁷ The provincial common stand identified by Quebec in CICS, Document 800-14/085 (*op. cit.*), includes this principle, which has been advanced most forcefully by Newfoundland but which also served as a basis for the federal government's agreeing, under Prime Minister Clark in September, 1979, to formally confer ownership and jurisdiction over offshore mineral resources on the coastal provinces (Office of the Prime Minister, "Release," October 3, 1979).

existing (and, on the Prairies, hard-won) provincial rights confirmed, strengthened, and protected against intrusion by the federal government or adverse interpretation by the Supreme Court of Canada, whose impartiality has been thought questionable. This motivation bespeaks a deep distrust of the federal government and a fear of the constitutional powers available to it.

This sense of vulnerability today seems to be most acutely felt among the petroleum-producing provinces in the West — especially in the aftermath of the National Energy Program — which see their interests being pitted against the more populous, and therefore politically influential, petroleum-consuming provinces. In this situation the federal government is not trusted to grant the interests of each side equal weight in determining the national interest. Rather, there is a continuing suspicion in the West that a double standard will be applied parallel to the uneven bases for federal electoral support and consistent with the heartland-hinterland view that generally conceives of resources in the hinterland being for the benefit of the industrial heartland.

While it may be easy enough to see why the federal government might be inclined to tailor an interpretation of the "national interest" to suit those parts of the country having, by force of representation-by-population, the greatest political clout, the layman may be perplexed about the possible legal means by which the federal government could legitimately override or curb provincial authority, bearing in mind the numerous references made these days to provincial ownership rights. Put another way, the political vulnerability of the West may be plausible and readily understandable on the basis of simple arithmetic, but the constitutional peril is much less obvious. A cursory examination of the BNA Act can prove enlightening.

Provisions of the BNA Act

The various matters over which Parliament has the exclusive power to make laws — the legal meaning of jurisdiction — are set out in Section 91 of the BNA Act and, for the provincial legislatures, in Section 92 of the Act. The term "natural resources," or the equivalent, does not actually appear in either section. At present, then, the Constitution does not provide, in Sections 91 or 92, for either level of government in Canada to have exclusive legislative authority over natural resources; nor, indeed, does it elsewhere provide explicitly for a sharing of jurisdiction over natural resources *per se*.

Legislative authority over natural resources is only one of two possible bases for control, however, the other being ownership.

The original parties to Confederation agreed that "lands, mines, minerals and royalties" should continue to belong to the respective provinces. This ownership was enshrined in Section 109 of the BNA Act. With the exception of the three Prairie provinces, each of the later entrants to Confederation had confirmed, in the course of entry, provincial ownership of Crown lands and mineral resources within their boundaries. By contrast, ownership rights were withheld for 60 years following the attainment of provincial status in the case of Manitoba and for 25 years for Alberta and Saskatchewan. Only in 1930 was ownership of the remaining (federal) Crown land transferred to these three provinces, with the BNA Act amended accordingly. But by that time, large areas and the accompanying mineral rights had already been "alienated" — granted to the CPR or to the Hudson's Bay company or otherwise transferred from public to private ownership in the course of settlement. As a result of the westerly direction taken by development, more was left to confer on Alberta than on either Saskatchewan or Manitoba. Consequently, while the principle remained the same, resource ownership under the Constitution was to become of greater significance to Alberta than to its neighbors on the Prairies.

The existing scope for provincial control of natural resources relies greatly on this ownership section. It gives the provinces much the same rights as any owner of property, and more. For example, ownership permits a provincial government to grant leases for exploration and exploitation of Crown resources, to charge royalties, to determine the rate of production, and possibly also to set the price of the resource, at least at the point of extraction — although this is where the law becomes unclear and open to interpretation. Provincial ownership also brings some derived legislative authority because Section 92(5), Management and Sale of Public Lands, applies. For control of privately owned resources in a province — and this relates especially to Saskatchewan — only the more general powers in Section 92 can be used, notably 92(2), which empowers provincial legislatures to levy "direct" taxes (but only direct taxes), and 92(13), Property and Civil Rights.

However, provincial control over natural resources, whether based on ownership or on legislative authority alone, is circumscribed by the jurisdiction of Parliament. (Or at least this was the accepted view until Alberta contested any such limitation on ownership rights as one line of argument in a case concerning the National Energy Program, which, as of mid-1981, the province had won by

unanimous decision of the Alberta Court of Appeal.²⁸) Of particular note is the exclusive federal power to regulate trade and commerce under Section 91(2) of the BNA Act, which, according to jurisprudence, applies to interprovincial and international trade, not to trade and commerce conducted within a province's boundaries. Equally important is the federal power to raise money "by any mode or system of taxation," given in Section 91(3), although this is constrained in Section 125, which says: "No lands or properties belonging to Canada or any province shall be liable to taxation."²⁹

Far more draconian are the following: the federal power simply to disallow provincial statutes in Section 90, which, although unused since 1943, remains in the Constitution;³⁰ the federal declaratory power in Section 92(10)(c), which can be used to assume jurisdiction over (although not simultaneously ownership of) "works . . . before or after their execution declared . . . to be for the general advantage of Canada or for the advantage of two or more provinces,"³¹ as has been done in the case of uranium mines, for example; and what is variously called the residual power or the "emergency" power provided through Parliament's authority, in the opening paragraph of Section 91, to make laws for "Peace, Order and Good Government" with respect to all matters not assigned exclusively to the provincial legislatures.³²

On the face of it, then, Parliament does have substantial jurisdiction with which to override or curb the exercise of provincial authority over resources. Moreover, as may now be evident, there is considerable uncertainty as to exactly where provincial rights end and federal powers begin.

²⁸ Simply put, Alberta claims that its resource ownership rights are absolute and unencumbered by all other provisions of the BNA Act because of the wording of the 1930 amendment. That amendment is seen to reflect, in turn, the understanding at the time of Confederation, when the original Section 109 was drafted: that natural resources would comprise the principal assets from which the provincial governments would derive their income. In particular, Alberta asserts that natural resources are and were from the outset expected to be immune from federal taxation. In its court challenge concerning provisions of the National Energy Program, Alberta used this argument in support of another argument — namely, that Section 125 prevents federal taxation of provincially owned property.

²⁹ Department of Justice, *A Consolidation of the British North America Acts, 1867 to 1975* (Ottawa: Supply and Services Canada, 1976), p. 35.

³⁰ Mr. Trudeau has himself suggested that the federal power of disallowance could well be abolished — provided that a bill of rights were entrenched in the Constitution (see his *Federalism and the French Canadians* [Toronto: Macmillan, 1968], pp. 44-45).

³¹ Department of Justice, *op. cit.*, p. 27.

³² *Ibid.*, p. 24.

Resource Ownership and Interprovincial Trade

The "best effort" draft amendment to the Constitution, produced in February, 1979, under the item Resource Ownership and Interprovincial Trade — the text apparently preferred by the provinces over any on the table during the 1980 round of talks — would have gone a long way toward clarification of the division of powers over natural resources and removal of the threat that hangs over provincial ownership rights. As an amendment to Section 92 of the BNA Act, it would have established expressly, and for the first time, exclusive provincial legislative authority over certain natural resources — specifically non-renewable resources, forestry resources, and "sites and facilities for the generation of electrical energy" — in the province.³³ Provincial legislatures would have had the exclusive power to make laws concerning the "exploration," "development," "extraction," "exploitation," "conservation," and "management" of these resources and "the rate of primary production therefrom."³⁴

They would also have had legislative jurisdiction — although shared concurrently with Parliament — over the export of raw or partially processed resources, both within Canada and abroad, provided that no interprovincial price discrimination were authorized. Any conflicting federal law would have always prevailed in matters of international trade; the same would have been true for interprovincial trade if the federal legislation were expressly "necessary to serve a compelling national interest that is not merely an aggregate of local interests."³⁵

The provinces would have gained access to the field of indirect taxes — again provided that they did not differentiate between production exported from the province and that retained within.³⁶ There was also a clause that stated, in effect, that none of these amend-

³³Federal-Provincial Conference of First Ministers on the Constitution, Ottawa, February 5-6, 1979, "List of Best Effort Draft Proposals with Joint Government Input Discussed by First Ministers" (Ottawa: CICS, Document 800-010/036).

³⁴*Ibid.*

³⁵*Ibid.* This basis for federal paramountcy would apply to circumstances other than an emergency established under the "Peace, Order and Good Government" authority of Parliament.

³⁶Saskatchewan, in particular, has sought such a change, arguing that the distinction between direct and indirect taxes "is based on 19th century economic theory." Moreover, Saskatchewan's need has been "highlighted by successful legal challenges of province resource taxation and regulation measures" — a reference to the CIGOL and Central Canada Potash cases. (See Federal-Provincial Conference, 1980, "Resources: The Saskatchewan Position" [Ottawa: CICS, Document 800-14/027].)

ments to Section 92 would have impaired the existing powers or rights of provincial legislatures or governments, the key one, of course, being ownership.³⁷ Furthermore, in a draft proposal discussed at the same time concerning the federal declaratory power, Parliament would have had to obtain the consent of the provincial government before a work located in a province could, by declaration, be brought under federal jurisdiction if that work were for the primary production or initial processing of any non-renewable or forestry resource or for the generation of electrical energy.³⁸

Taken together, these suggested changes to the Constitution would have fulfilled provincial objectives to a remarkable degree. During the conference in February, 1979, the Premiers on the whole acknowledged this. If there was one bone of contention, it was the phrase "compelling national interest," which, as noted above, was to serve in situations of less than emergency proportions as grounds for federal paramountcy over provincial laws governing the inter-provincial movement of natural resources. Not surprisingly — but somewhat prophetically — the protagonists were the federal and Alberta governments. Prime Minister Trudeau argued that there should be some provision for federal intervention in case any province chose, for example, to price its resources at punitively high levels or showed favoritism in the terms and conditions attached to supply or distribution beyond provincial borders; otherwise, the provinces would be left with too much power. Premier Lougheed, in turn, took the general position that provincial ownership rights should not be encumbered by the federal trade and commerce power, whether in "terms of development, rate of production or sale in the marketplace" — at "fair market value."³⁹ If there was to be any qualification at all,

it should at most be a defined area with regard to what is a compelling national interest, such as an international or national crisis that creates a shortage of supply, and . . . the burden of proof should be on the federal government in exercising that caveat or encumbrance upon the province's ownership of resources.⁴⁰

In short, the Premier was prepared to allow Parliament to override provincial actions, but only if the permissible circumstances

³⁷ Alternatives were also considered as to the possible "disposition" of Section 109: either leaving it as is or bringing it forward, by way of reaffirmation, in an amendment to the Constitution.

³⁸ CICS, Document 800-010/036 (*op. cit.*).

³⁹ This argument can be seen as the forerunner to Alberta's position in the recent court challenge on provisions of the National Energy Program (see Federal-Provincial Conference, 1979, *Verbatim Transcripts*, pp. 83-84).

⁴⁰ *Ibid.*

were spelled out beforehand. To his way of thinking, only emergencies would qualify. He thought the term "compelling national interest" too vague and capable of extremely broad interpretation — even when taken together with the rest of the clause, which read in full that such federal laws would have to be expressly "necessary to serve a compelling national interest that is not merely an aggregate of local interests." On this point, Premier Lougheed received some support from his counterparts from Quebec and Newfoundland, although conspicuously not from the Premier of Saskatchewan. The latter considered the full clause adequate but subsequently objected to the national interest being defined solely by the popular will in the House of Commons.

In an interview given several months later, Premier Lougheed explained his reservations in a way that unmistakably showed his distrust and the basis for it:

Just to say "compelling national interest" and then have a government which is controlled by Ontario MPs decide in Ottawa what "compelling national interest" is, is just not good enough!⁴¹

Tragically, the "national interest" had become devoid of patriotic appeal or compulsion, even when glorified by words like "compelling," because the term was understood to be the federal government's catchword for the interests of the Ontario heartland. Unless bound by clear and stringent constitutional rules to the contrary, Parliament was expected to give the national interest a parochial interpretation.

This perception will, if anything, have grown sharper in the aftermath of the National Energy Program. While the Alberta government saw the province isolated by the federal measure, and its resource ownership rights invaded (like one's living room), the federal government took refuge in the "national interest." For example, the Hon. Marc Lalonde is quoted as having said in an interview just a few hours before Premier Lougheed announced the cutback in production:

We're the national government. . . . We have to look after the national interest as we see it, the best we can. . . . That's what we've been elected to do.⁴²

⁴¹ From the mimeographed transcript of the interview given by Mr. Lougheed to Laurier LaPierre in Calgary on June 21, 1979.

⁴² See Gordon Jaremko and John Howse, "Lalonde Vows to Get Us in Line," *Calgary Herald*, October 31, 1980. The Minister is also reported to have expressed his doubt that, despite resource ownership rights under the existing Constitution, Alberta could enforce a production cut for long: "It's highly questionable whether they (the Alberta government) would have the constitutional right to order a cut in production just because they don't like the price."

In any case, by the time the constitutional talks resumed again in 1980, the federal government had withdrawn any support for the 1979 "best effort" draft amendment on natural resources. Gone from the bargaining table, too, was its earlier proposal that would have made the exercise of the federal declaratory power over works for resource production subject to the consent of the appropriate provincial government. Instead, federal ministers proposed an amendment that, among other things, placed no constraints whatsoever on Parliament's authority to override provincial laws concerning the movement of resources across provincial boundaries within Canada. In the event of any conflict between the two — on the matter of price, for example — federal jurisdiction would always have prevailed over provincial jurisdiction.⁴³ Any arguable concession to provincial prerogatives implied earlier by restricting the grounds for federal paramountcy to "compelling national interest" had been rescinded. The phrase had been rescued from scrutiny and stowed safely back within the ethos of the federal government. Rather than seize the opportunity created by Premier Lougheed's criticism to dispel provincial distrust by replacing those subjective words with objective ones — thereby also clarifying the division of powers over natural resources — the federal government had withdrawn the caveat altogether and, in so doing, may have lent credence to provincial suspicions. In contrast, Prime Minister Trudeau's worries had been taken care of because the new federal proposal prohibited not only price discrimination by the provinces but also discrimination "in supplies exported to another part of Canada."

This hardening in the federal government's position on resources mirrored and reinforced, in no small way, the shift toward conventional country-building, which, as noted, had occurred in the overall agenda. Provincial governments resisted this by reintroducing the 1979 "best effort" draft amendment to the 1980 negotiations. Moreover, when Quebec identified the extensive components of a "common stand" among the provinces near the close of the September, 1980, First Ministers' conference — in what was apparently a last-ditch effort to reach agreement with Prime Minister Trudeau — the 1979 text on natural resources, with its "compelling national interest" phrase, is shown to have been preferred in principle, if not in every detail or by unanimous agreement.⁴⁴ Whether Alberta associated itself privately with this aspect of the common stand, thinking

⁴³ See Federal-Provincial Conference, 1980, "Legal Texts Forming Appendices to CCMC Reports to First Ministers" (Ottawa: CICS, Document 800-14/060).

⁴⁴ CICS, Document 800-14/085, *op. cit.*

that even a vaguely worded limitation on federal power would be better than none — which seems unlikely, given earlier staunch opposition — Premier Lougheed publicly dismissed the 1980 federal proposal as a trifle, of no consequence in the province's pursuit of confirmation and protection of resource ownership rights.

Constitutional Amendment on Resources, 1981, in Relation to Provincial Objectives

As it happened, however, both the 1979 and the 1980 proposals were to be replaced by yet another proposal in 1981. When the federal government's Resolution was returned to the House of Commons (from the Special Joint Committee) in the form of a motion in February, 1981, it contained, as Part VII, a new amendment on "Non-Renewable Natural Resources, Forestry Resources and Electrical Energy."⁴⁵ (This part is reproduced in the Appendix to this Observation.) The amendment bears some resemblance to the 1979 "best effort" draft, but it is much closer to the 1980 federal proposal in the scope of legislative authority formally conferred on the provinces. The three proposals are compared in Table 2.

As indicated earlier, when the latest series of negotiations began in 1978, the provinces had three basic objectives for constitutional reform regarding onshore natural resources:

- protection of existing provincial ownership rights
- clarification of the federal-provincial division of powers
- strengthening of provincial legislative authority.

The relative importance attached to each objective has no doubt varied from province to province, not only as a result of disparities in the kind and magnitude of nature's endowments but also, especially among the Prairie provinces, because of differences in the proportion of resources owned by the provincial Crown.

Taking only Alberta and Saskatchewan as examples, one could expect Saskatchewan to be more interested in strengthened legislative authority than Alberta because the latter owns a larger portion of the resources within its boundaries and therefore has wider management control, as a government, without having to resort to supplementary legislative authority. By the same reasoning, Saskatchewan would be more concerned with gaining access to the field of indirect taxation because it can rely less on revenues in the form of royalty payments. Similarly, Saskatchewan would

⁴⁵ "Motion Tabled in the House of Commons by the Minister of Justice," *op. cit.*

seek concurrent jurisdiction over international trade more vigorously than would Alberta because of the immediate significance for the former of export markets for uranium and potash. On the whole, one could expect Alberta, in turn, to stress the confirmation and protection of ownership rights and, to this end, a clarification of the division of powers so that the respective limits of federal and provincial authority would be understood — and respected — by both sides. Particularly vital in this connection would be, first, the demarcation of federal legislative authority to tax resources vis-à-vis provincial proprietary rights to royalties and the like and, second, federal jurisdiction over interprovincial trade vis-à-vis the provinces' rights, again primarily as owners, to determine the rate of production and the price of resources.

Against this background, one can begin to surmise the degree to which the aims of these two provinces and of other province-builders have been achieved by the proposed 1981 constitutional amendment. Most of this must be conjectural because we have had little firsthand indication from the provincial governments on this particular aspect of the Resolution. Because the provinces generally preferred the 1979 "best effort" draft to the 1980 federal proposal, however, by extension the 1981 amendment would be considered even less acceptable. Moreover, each of the earlier texts had been discussed in the context of related proposals made under different agenda items that, treated as a package, would have bolstered protection of provincial ownership rights and powers over natural resources. As shown in Table 2, the most significant proposals of this kind were a 1979 draft amendment to restrict the exercise of the federal declaratory power and a 1980 "best effort" draft on the Supreme Court of Canada that would have given the provincial governments a definite role in the appointment of judges — requiring the Attorney General of Canada to do more than simply "consult" his provincial colleagues, as had been discussed in 1979.⁴⁶ Neither of these has any counterpart in the 1981 Resolution.

Premier Blakeney of Saskatchewan must have been pleased by the new authority for indirect taxation, but he has expressed disappointment that the proposal makes no provision for provincial jurisdiction over international trade in resources. In the course of bilateral negotiations on the Resolution, held at the final hour, the federal government did offer Saskatchewan — on behalf of all the provinces — concurrent jurisdiction. According to the Premier, how-

⁴⁶ CICS, Document 800-14/085, *op. cit.*, Appendix D.

TABLE 2

Comparison of Proposed Constitutional Amendments on Resources

	1979 "Best Effort" Draft	1980 Federal Proposal	1981 Resolution
Types of Resources	Non-renewable natural resources, forestry resources, and sites and facilities for generation of electrical energy in the province, as well as primary production therefrom	Same	Same
Exclusive Provincial Legislative Authority	Exploration, development, exploitation, extraction, conservation, and management of the above resources (as appropriate)	Substantially as in 1979 because, although the terms "exploitation" and "extraction" are deleted, the remaining words can be thought to embrace these activities	Same as 1980 proposal
Export within Canada	Provincial laws in relation to export of primary production provided no price discrimination; federal laws in conflict would prevail to the extent necessary to serve a compelling national interest	Prohibits discrimination in prices but also in supplies exported to other parts of Canada; federal laws would always prevail in any conflict	Same as 1980 proposal
Export Abroad	Provincial laws in relation to export of primary production; federal laws would always prevail in any conflict	Same as 1979, but scope of provincial laws subject to limitations "to be determined"	No provision for provincial authority
Taxation	Provincial laws to raise money by any mode or system of taxation — including indirect taxes — in respect of resources, provided no differentiation between production retained in province and that exported within Canada	Same	Same

Same as 1980 proposal (see "The Sixth Schedule" in the Appendix to this Observation)

Substantially the same, but with specific exclusion of products resulting from refining upgraded heavy crude oil or from refining gas or liquids derived from coal

Same

Same

No equivalent

No equivalent

Generally to extend beyond extrac-
tion from natural state but not to
manufactured stage

Nothing in amendment derogates
from the existing powers of a legis-
lature or government of a province
(the latter meaning ownership
rights)

No equivalent

Appointment of judges to the Su-
preme Court of Canada to follow a
procedure requiring consultation
with all provincial Attorneys Gen-
eral and consent of the Attorney Gen-
eral of the province from which the
person is drawn

Definition of
Primary
Production

Existing
Powers

Parliament's exercise of declara-
tory power subject to consent of the
province where a work for resource
production located

Directly
Related
Proposals

ever, provincial authority would have been limited to that "required to maintain the economic health of the industry" and "would not have permitted control over many other aspects of the production of resources entering international trade."⁴⁷ On that basis, Premier Blakeney declined the offer. The federal government finally opted for no concession rather than one not fully satisfactory to the province most concerned — in an action reminiscent of that witnessed earlier for the caveat of "compelling national interest" offered on federal jurisdiction over interprovincial trade.

Regarding Alberta's objectives, on the face of it the amendment affords explicit protection for existing provincial ownership rights through the "nothing . . . derogates" clause. The limits of ownership rights have not yet been fully delineated in constitutional law, however, and there is nothing in the remainder of this amendment that would lessen the scope for challenge and dispute by clarifying the meeting ground between the legislative authority of Parliament and the rights of provincial governments as resource owners. If one assumes — as the Premier of Alberta apparently does not⁴⁸ — that the legislative powers of Parliament take precedence over provincial ownership rights, exercise of the latter would be *ultra vires* in the case of "*discrimination in prices or in supplies*" of resources entering interprovincial trade — whatever these terms may subsequently be interpreted to mean by the courts — and further offset by federal paramountcy in the case of any conflict generally. For all practical purposes, Parliament may have only to enact legislation that would "occupy the field" of interprovincial trade in order to nullify pertinent provincial legislation or Orders-in-Council. To some extent this has already been accomplished with the Petroleum Administration Act of 1975 and the Energy Supplies Emergency Act of 1979. The crucial part of the former — enacted in 1975 but finally proclaimed in the context of the federal Budget of October,

⁴⁷ See the Premier's statement of February 19, 1981.

⁴⁸ There seems to be some inconsistency in this general position taken by the Alberta government. On August 1, 1980, the provincial Cabinet authorized a price increase for oil (and the federal government did not intervene), yet following the National Energy Program (when the federal government established a future price schedule), the province did not counter with its own schedule but instead authorized a production cutback. Curiously, during his October 30, 1980, address the Premier remarked that Alberta did not have the power to set the price and was therefore relying on its control of production to retaliate. Presumably he meant, more specifically, that Alberta *no longer* had the right (of an owner) to set the price because the federal government had usurped it with the proclamation of Division II, Part II, of the Petroleum Administration Act in the context of the federal Budget. This federal encumbrance upon provincial ownership rights has not, however, been challenged in the ensuing court case.

1980 — permits the federal government to set the price of oil without the agreement of the producing provinces. Because of the sweeping powers it contains, the latter Act was described by commentators at the time as tantamount to a War Measures Act for energy.⁴⁹ Thus not even allowing for the legislation that has ensued from the National Energy Program, the federal government has already taken *de facto* jurisdiction in recent years over the same area where it now professes to be "inviting [the provinces] to participate in decision-making."⁵⁰ Moreover, there are no qualifications — "compelling national interest" or otherwise — on countervailing federal laws that might be enacted in future concerning interprovincial trade in resources.

Although the 1981 amendment contained in the Resolution serves to consolidate provincial *legislative* authority — and clearly adds new authority to levy indirect taxes on resources — on the whole it removes little of the uncertainty that surrounds the current division of powers in the field, and it does nothing to alleviate provincial distrust. Indeed, if the Hon. Marc Lalonde is reading the provisions correctly, the amendment might only add to Alberta's sense of apprehension, particularly because the Minister reportedly believes that Parliament could use the amendment to put a stop to Alberta's oil production cutbacks, even though "*on the surface* [it would] give greater validity to the Alberta action."⁵¹

Resource Revenues

Although one might reasonably assume that the intergovernmental distribution of revenues from natural resources would have commanded special attention in the constitutional discussions, such was not the case. Rather, this thorny problem — which Anthony Scott has called "a test of federalism" — received only obscure treatment. Perhaps the First Ministers felt justified in skirting it because, strictly speaking, existing constitutional law does likewise. Yet as Scott has pointed out,

the power to vary the rate or amount of resource charges or the method of their collection, like the power to vary the conditions of resource

⁴⁹ See Jennifer Lewington, "Is Ottawa's Emergency Energy Law a New War Measures Act?," *Canadian Business*, July, 1979, pp. 12 and 14.

⁵⁰ This was how the Hon. Marc Lalonde described the provision of the amendment regarding interprovincial trade in natural resources (see "Notes for an Address by the Hon. Marc Lalonde, Minister of Energy, Mines and Resources, to the 'Conference on Energy' at McGill University," Montreal, February 12, 1981).

⁵¹ See Gordon Jaremko, "Amending Will Give Ottawa Power over Alberta Cutbacks," *Calgary Herald*, March 11, 1981 (emphasis added).

tenure or exploitation, is an indispensable tool of provincial economic management. . . . Just as the tariff is the key tool for the policy of protecting manufacturing industries, and just as railway freight rates are a tool of agricultural and locational policy, so manipulating resource revenues is an instrument of regional economic policy.⁵²

The ability to manipulate resource revenues is therefore a handy tool for the kits of province-builders and country-builders alike.

As described in the previous section, the talks dealt with the forms of revenue collection permitted the provinces — but not, perforce, denied the federal government. The equally pertinent matter of the resultant size of the respective federal-provincial shares was not broached, except in the case of offshore resources. As a result, the constitutional discussions left unopened an issue basic to the division of powers (whether written or unwritten) — namely, which level of government would be left in the dominant position to use resource revenues as an economic policy instrument. Nor was there even tacit agreement on a corollary of this: which level of government was to be recognized as the primary agent for the redistribution of resource revenues.

The issue was broached in the case of offshore mineral resources with the Prime Minister's offer of September, 1980, to let the coastal provinces "receive [secondhand] the same kinds of revenues as are derived by provinces from onshore resources" until such time as "they become 'have' provinces," but "beyond that point, they would share an increasing proportion of offshore revenues with all Canadians."⁵³ This notional formula was said to reflect the federal government's belief that, "when a province grows wealthy enough to stand on its own feet, it should begin to share its wealth with the rest of the country."⁵⁴ British Columbia was assured that, despite its having already achieved "have" status (under the equalization formula), "a reasonable share" of offshore resource revenues would be forthcoming from the federal Crown as owner.⁵⁵

Newfoundland's Premier Peckford rejected the proposal, arguing that it would allow only for per capita government revenues in the province to rise to the national average — that being the con-

⁵² Anthony Scott, *Divided Jurisdiction over Natural Resource Revenues*, Resources Paper, No. 52 (Vancouver: Programme in Natural Resource Economics, Department of Economics, University of British Columbia, 1980), pp. 14-15.

⁵³ Federal-Provincial Conference, 1980, "Notes for a Statement by the Prime Minister of Canada on Offshore Resources" (Ottawa: CICS, Document 800-14/068).

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

ventional definition of "have" — and failed to take into consideration the disparity in average levels of earned income between citizens of the province and their fellow Canadians. Instead, Newfoundland sought "nothing more than equality of treatment" for offshore and onshore resources in the Constitution and, apparently, nothing less. In the Premier's terms this meant "that the *normal* legislative jurisdiction and competence of the federal government would apply" to offshore resources as would its "*normal* revenue raising powers . . . through such measures as corporate and personal income taxes and customs and excise duties."⁵⁶ On its own behalf, Newfoundland sought confirmation of its alleged proprietary rights to the minerals of the adjacent continental shelf, equivalent to those for provincially owned lands not covered by salt water. This arrangement would have satisfied Newfoundland's own belief that, "as a matter of principle, the Canadian Constitution must reflect the juridical [legal] equality of provinces and the equality of opportunity for them to develop their societies."⁵⁷

The upshot of equal status defined this way would be to have offshore revenues escape from a mandatory, federally administered formula for sharing and join revenues from onshore resources where there is no such formula — but, instead, periodically negotiated price and taxation regimes — a decidedly unequal distribution of revenues among provinces, and a history of federal-provincial competition for larger shares.

To judge by additional remarks made by the Premier of Newfoundland at the Conference, he understands fully Scott's assertion and, in the province-building mode, expects to exercise "the rights of ownership," including the right to royalties, to manage the development of offshore resources according to the particular interests of his province. After all, he noted, Newfoundland is destined to "experience all of the adverse impact. . . . No distant government, untouched by events, regardless of its benevolence or good intentions can adequately perform this function."⁵⁸

The Prime Minister's offer would have come as no surprise to alienated Prairie folk who imagine that the federal government regrets the transfer of resource ownership rights in 1930 — coming

⁵⁶ "Notes for a Statement on Offshore Resources by the Hon. A. Brian Peckford, Premier of Newfoundland and Minister for Intergovernmental Affairs, at the Federal-Provincial Conference of First Ministers on the Constitution," Ottawa, September 8-12, 1980, p. 6.

⁵⁷ *Ibid.*, p. 1.

⁵⁸ *Ibid.*, p. 5.

as it did when there did not appear to be too much of value under the ground and 17 years before the discovery of oil at Leduc. They do not expect the federal government to make the same "mistake" in respect of the Yukon or the Northwest Territories or of the continental shelf. They do expect the federal government to try to avoid having as much trouble with Alberta in the future by curbing ownership rights and by securing a larger share of revenues so that this important tool of economic development can be used more in tune with objectives identified at the national level.

Links can be drawn between the hardened position taken by the federal government, under the Liberals, on provincial control over onshore resources and its continued denial of any legal claims by Newfoundland and other coastal provinces to ownership of offshore resources. Countless dealings with Alberta may have given the federal government a fuller appreciation of the potency of ownership rights, making the application of these rights to the possible vast petroleum deposits off Canada's East Coast an appetizing prospect. Or federal Energy Minister Lalonde may have summed it up when he reportedly confided to his Newfoundland counterpart during the constitutional talks in the autumn of 1980, "We don't want to have the same trouble with you guys as we are having with Alberta."⁵⁹

For its part the federal government argues that natural resources are the nation's patrimony and therefore, in a sense, belong to all Canadians; consequently, there is a valid and necessary role for the federal government not only in the formulation of national strategies for exploitation and use but also as a recipient of revenues to enable all Canadians to share in the largesse. No matter how worthy and uncontroversial this position may be in the abstract, however, all the talk about the merits of "sharing" fails to get a sympathetic hearing in those parts of the country that are expected to give generously when the federal government is challenged and distrusted as the guiding hand of economic development and the agent of redistribution.

Economic Union

The cause behind which country-builders have rallied in the constitutional debate is aimed at "securing the Canadian economic union in the Constitution," the centerpiece of federal proposals made under the agenda item, Powers over the Economy. A comparatively late arrival to the federal-provincial bargaining table — despite

⁵⁹ See "Newfoundland Plans to Share," *Calgary Herald*, April 2, 1981.

the theme having been a long-standing one for country-builders, as Evenson and Simeon have noted — it received more than the usual fanfare, including release to the public of a federal discussion paper in August, 1980.⁶⁰ The paper sets out the arguments in support of a purer economic union within Canada. Put rather more succinctly, perhaps, than the author would approve, the rationale is as follows: Freedom of mobility anywhere within Canada should be a right of personal or corporate citizenship. Fuller economic integration generates a higher standard of living for all Canadians through the achievement of greater economic efficiency from the realization of economies of scale and gains from internal trade based on exploitation of local or regional comparative advantage. Other federations embrace economic unions — even sovereign states together, like the European Economic Community, do better than does Canada. Yet despite such economic logic and the fine example shown by others, provincial governments persist in erecting and maintaining barriers to the free interprovincial movement of goods, services, labor, and capital through procurement policies, marketing boards, product standards, allowances for the processing of natural resources, transportation regulations, local hiring restrictions, licensing of professionals, certification of skilled tradesmen, restrictions on business conduct, and eligibility for government aid.⁶¹

The term "barriers" has been applied rather indiscriminately in the criticism by country-builders to a host of conditions that could stem either from outright provincial protectionism or simply from a lack of uniformity in provincial laws, regulations, and practices — including tax rates. Protectionism is more liable to effectively halt movement that would otherwise take place, as in extreme instances where a provincial government uses its good offices to block the financial takeover of a local company by another based outside the province — as has been done by both Quebec and British Columbia. Variations among provinces in effect present capital and labor with a cross-country menu of incentives (and relative disincentives) and thus may do as much to promote mobility as to impede it. Of course, interprovincial differences in standards and procedures can also increase the cost of doing business for any company with operations that traverse borders and can create difficulties for workers and their families moving from one province to another.

⁶⁰ The Hon. Jean Chrétien, *Securing the Canadian Economic Union in the Constitution* (Ottawa: Government of Canada, 1980).

⁶¹ See *ibid.*, Annex A, pp. 34-46, for a catalog of these practices.

There is little question that sound economic arguments can be marshalled in support of a better economic union. As the federal discussion paper points out, "protectionism among provinces is not an economically neutral way of redistributing economic activity . . . it can involve efficiency losses *for Canada as a whole*."⁶² These losses can occur, for example, if economies of scale or gains from interprovincial trade based on comparative advantage cannot be fully realized. The difficulty lies in determining the extent to which economic imperatives can and should be applied more rigorously at the national level in Canada, given the federal system of government and the current distribution of powers, since it is also true that an economic union functions best when coupled with a similarly high degree of political integration.⁶³

The federal government acknowledges this limitation insofar as its paper states that

the constitutional securing of *absolute* economic mobility within Canada would obviously be *incompatible with the maintenance of a federal system*. The recognition of distinct political entities within the federation is predicated upon the existence, and continued existence, of different economic, social and cultural aspirations among the various populations they serve. Consequently, *provincial legislation and regulation must be capable of variation* from province to province, and such variation will inevitably cause some impediments to economic mobility, but these must be kept within the bounds of necessity.⁶⁴

Moreover, the federal government apparently recognizes that it may not be blameless:

It should also be noted that costs can result from the *injudicious use* of the federal government's *virtually unrestrained ability*, under the present Constitution, to derogate from the principles of economic union in areas under its jurisdiction.⁶⁵

A concrete illustration of the kind of impediments to mobility that the federal government itself has put in place is given by the 1980

⁶² *Ibid.*, p. 30 (emphasis added).

⁶³ Thus the recent establishment of a European Parliament can be seen as a step toward political integration, perhaps a necessary one to complement the workings of the EEC. The C. D. Howe Institute has elsewhere explored the meaning of an economic union. See, in particular, two publications in the Accent Québec series: Roger Dehem, *On the Meaning of "Economic Association"*, No. 3 (Montreal: C. D. Howe Research Institute, 1978) and Maxwell and Pestieau, *op. cit.* For further reference see A. E. Safarian, *Canadian Federalism and Economic Integration*, Constitutional Study prepared for the Government of Canada (Ottawa: Information Canada, 1974); Thomas J. Courchene, "Towards a Protected Society: The Politicization of Economic Life," Innis Memorial Lecture delivered at the Annual Meeting of the Canadian Economic Association, Montreal, June, 1980; Peter Leslie, *Equal to Equal: Economic Association and the Canadian Common Market*, Discussion Paper, No. 6 (Kingston, Ont.: Institute of Intergovernmental Relations, Queen's University, 1979); and Task Force on Canadian Unity, *A Future Together: Observations and Recommendations* (Ottawa: Supply and Services Canada, 1979).

agreement between the federal Department of Regional Economic Expansion and the government of Nova Scotia for assistance to Michelin Tires (Canada) Ltd. This agreement explicitly requires the company "to train and employ to the maximum extent practicable persons who are resident in Nova Scotia."⁶⁶

The pursuit of an economic union becomes a matter of degree: where to draw the line on efficiency losses for Canada as a whole, accepting that there will be such losses as the price of federalism, but also accepting that Canada is not starting with a fresh slate.

The main thrust of the federal government's solution, introduced in 1980 during the constitutional discussions, was to limit the scope for interference in the operation of the Canadian economic union by both levels of government, although to different degrees. A constitutional amendment would have forbidden both levels to discriminate by law or practice

in a manner that unduly impedes the operation of the Canadian economic union on the basis of the province or territory of residence or former residence of a person, on the basis of the province or territory of origin or destination of goods, services or capital or on the basis of the province or territory into which or from which goods, services or capital are imported or exported.⁶⁷

Both levels of government, however, would have been allowed discriminatory laws if these were enacted "in the interests of public safety, order, health or morals." In the case of the provinces alone, discriminatory laws would have been valid to provide for "reasonable residency requirements as a qualification for the receipt of publicly provided goods or services" or if enacted to reduce economic disparities *within* a province.⁶⁸ Correspondingly, for Parliament alone, discriminatory laws would have been valid if enacted "in accordance with the principles of equalization and regional development" or in relation to a matter "declared . . . to be of an overriding national interest."⁶⁹

An ancillary federal proposal would have delineated and enlarged Parliament's jurisdiction over trade and commerce by adding to Section 91 legislative authority over "competition" and over

⁶⁴ Chrétien, *op. cit.*, p. 30 (emphasis added).

⁶⁵ *Ibid.* (emphasis added).

⁶⁶ Subsidiary Agreement for Assistance to Michelin Tires (Canada) Ltd., June 7, 1980, Schedule C, Clause 13.1.

⁶⁷ Federal-Provincial Conference, 1980, "Legal Texts Forming Appendices to CCMC Reports to First Ministers" (Ottawa: CICS, Document 800-14/061), "Economic Union, Draft 1."

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

"the establishment of product standards throughout Canada," and "for greater certainty" in the interpretation of the present Section 91.2, "regulation of trade and commerce" would have included "the regulation of trade and commerce in goods, services and capital."⁷⁰

Only Ontario advocated a constitutional amendment that would have imposed, in effect, a charter of economic rights and freed the Canadian market from all impediments (or special inducements) to the mobility of labor, capital, goods, and services created by any government.⁷¹ Otherwise, the common objective was apparently to find the right form of subjective words by which to limit the scope for interference in the operation of the Canadian economic union by the two levels of government. There was also concern about the choice of a suitable arbiter — other than, or in addition to, the Supreme Court — on questions of interpretation of those words.

If one can judge from the dialogue at the First Ministers' conference in September, 1980, negotiations broke down because the Premiers of provinces other than Ontario rejected what they saw as an entrenchment of the economic *status quo*. The marketplace to be liberated from barriers to mobility across the country was, after all, the central Canadian marketplace, already highly developed as a result of favorable tariff and freight rate structures and other elements of the National Policy, which, although more than a century old, is obviously considered alive and kicking. Premier Davis more or less acknowledged that this would be the result by saying that Ontario could "survive" a constitutional amendment on the economic union "better than any other province with the possible exception of Quebec." To which Premier Hatfield retorted: "You've got ITC; we have DREE!" — with all that the names behind the acronyms imply.⁷²

Finally, province-builders were not prepared to relinquish the constitutional discretion provided them within the existing division of powers to promote greater self-reliance and purposefully to compensate through "affirmative action" for the unfavorable effects of economic policies conceived at the national level. They could not accept the double standard embodied in the federal government's proposals that would have tied their hands, however loosely, but would have given Parliament license to create or destroy barriers

⁷⁰*Ibid.*, "Trade and Commerce, Suggested Federal Draft."

⁷¹*Ibid.*, "Economic Union, Draft 3" (Ontario proposal).

⁷²A reference to the federal Department of Industry, Trade and Commerce and the federal Department of Regional Economic Expansion, respectively.

in accordance with its own collective vision of regional development and the national interest. Here again, the federal government could not be entrusted with the sole responsibility to determine how economic benefits should be distributed because it was not expected to deal evenhandedly with all parts of the country.

Constitutional Amendment on Mobility Rights

It may have been that the federal government's stance on the economic union was all for show: a "straw man" crafted to serve on the agenda as a suitable match for the opposing provincial champion so that, in the foreseeable deadlock of battle between the two, other worthy opponents of an essentially non-economic nature (patriation, a Charter) could come through unscathed. Whatever the explanation, little of the federal government's concern about the economic union has found its way into the Resolution. The new Charter of Rights and Freedoms in Schedule B of the Resolution contains a section on "Mobility Rights," but this is only a variation of the corresponding section in the federal draft of the Charter discussed at the First Ministers' conference in September, 1980.⁷³

The section gives every citizen and permanent resident of Canada the right to "move to and take up residence in any province" and to "pursue the gaining of a livelihood in any province." Laws and practices could not be applied in a province to "discriminate among persons primarily on the basis of province of present or previous residence."⁷⁴ This section does not, however, prohibit general laws and practices that discriminate among persons secondarily or incidentally on those grounds. Discriminatory laws that set "reasonable residency requirements as a qualification for the receipt of publicly provided social services"⁷⁵ are permitted.

There is no mention of the freedom of mobility for goods, services, and capital argued to be so crucial to an economic union. On the face of it this amendment deals only with the mobility of labor, assuming that the word "citizen" is taken to mean a person but not a corporate entity. Furthermore, it is a matter of speculation whether the right to pursue a livelihood may prove to be too general to invalidate existing provincial laws that grant preference to local labor in

⁷³ Federal-Provincial Conference, 1980, "Legal Texts Forming Appendices to CCMC Reports to First Ministers" (Ottawa: CICS, Document 800-14/058), "Charter of Rights and Freedoms, Federal Draft."

⁷⁴ "Motion Tabled in the House of Commons by the Minister of Justice," *op. cit.*, Schedule B, Constitution Act, 1981, Part I, Canadian Charter of Rights and Freedoms, Section 6.

⁷⁵ *Ibid.*

specific occupational fields — for example, construction in Quebec and offshore oil jobs in Newfoundland.

Regional Economic Inequalities and Redistribution

One of the chief stumbling blocks to agreement on the constitutional reforms sought most vigorously by province-builders and country-builders was the inequality of Canada's regional economic structure as summarized in the heartland-hinterland dichotomy. The cornerstone of that inequality has been, and remains, the National Policy. In broad terms it set the stage for more than a century of political and economic growth that would secure the industrial base established in the central Canadian heartland and develop the hinterlands, especially to the west, principally as a market for domestically manufactured goods and as a source of supply of agricultural produce and natural resources.

Narrowly defined, the National Policy was the protective tariff adopted in 1879 by the federal government under Sir John A. Macdonald. However, that can be considered just one instrument of a broad policy for the creation of a cohesive national political and economic unit in British North America. As part of the overall design the colonization of the Prairies and the extension of commerce from the Atlantic to the Pacific were to serve "the interests of the Dominion" — as then constituted — and to ensure the continued strength and prosperity of the commercial "empire of the St. Lawrence." Interests and goals indigenous to the hinterlands had little bearing, even after the design came to fruition and — once the tariff was in place, the CPR line had been completed, and the Prairies were settled with immigrants — began to take new forms of expression. In mid-1981, federal decisions can still be imputed to the National Policy and its general thrust. Illustrations include the actions taken recently to restrict the import of Japanese cars, to prolong protection of the textile industry, and to reduce transcontinental passenger service on the Prairies and in the Maritimes.⁷⁶

That the regional heartland-hinterland inequality should also be considered unfair (to the point of being intolerable) in some parts of the country reflects what one writer has called the Canadian cul-

⁷⁶ According to a Canadian Press review in the *Calgary Herald* (August 4, 1981), an editorial in the Quebec City newspaper *Le Soleil* made the following comment on the reductions in rail service: "How can he (Pepin) convince Westerners and Maritimers that his latest action is not yet another example of how federalism favors Ontario and Quebec? The nature of the cuts shows how the government gives top priority to the Quebec City-Windsor Corridor." The interests of the old "empire of the St. Lawrence" are seen as dominant — and unfair — even there.

ture of redistribution — using the term “culture” advisedly. According to Herschel Hardin, the Canadian culture is one of regional equality; it has been “nourished by powerful regional communities” and represents a mutual understanding that “the country has to be just to its parts to keep the parts in the whole.”⁷⁷ To do so, Canada has had to forego the U.S. approach — one that would have let regional fortunes wax and wane as determined by the rules of the market. Instead, Canadians have instituted various insurance schemes against the market tendency to produce “unequal effects” felt to be unjust, especially in the Maritimes and in the West. While the “mythic American way” has been the “redistribution of people to wealth” — in short, migration — the Canadian disposition has been “the redistribution of wealth to people.”⁷⁸

A statement from the *Report of the Royal Commission on Dominion-Provincial Relations* (the Rowell-Sirois report) captures the essence of redistribution, Canadian-style:

When, as a result of national policies undertaken in the general interest, one region . . . is fortuitously enriched and others impoverished, it would appear that there is some obligation if not to redress the balance, at least to provide for the victim.⁷⁹

Viewed in this light, only the types of compensation and rehabilitation for the “victims” have changed over the years: from the guaranteed federal subsidies that marked each province’s entry into Confederation and relief payments to the Prairies during the Great Depression to the equalization cheques now mechanistically issued to the “have-not” provinces; from the Prairie Farm Rehabilitation Act of 1935 to the latest subsidiary agreement for development assistance from DREE. Conditioned by a host of such programs, regional redistribution has become second nature to Canadians, so much so that principles bearing familiar labels could soon be enshrined in the Constitution with relatively little scrutiny or controversy.

It is ironic that constitutional commitments of this nature would be undertaken at the very time when

⁷⁷ Herschel Hardin, *A Nation Unaware: The Canadian Economic Culture* (Vancouver: J. J. Douglas, 1974), p. 307.

⁷⁸ *Ibid.*, p. 301. Hardin observes that the U.S. approach to economic inequality is consistent with an ideology that values “economic individualism” and “free enterprise.” Thus, throughout U.S. history, “Americans were not just born equal. They could be reborn equal, by moving on. . . . Labour followed wealth, or the chance of wealth” created in ever-changing geographical patterns by the workings of the market.

⁷⁹ Quoted in *ibid.*, p. 307 (emphasis added).

- province-builders are aggressively attempting to counteract and redress inequity on their own terms and to challenge the dominance of Ontario
- the federal government is distrusted, outside the heartland, as the agent for redistribution
- redistributive programs such as the present equalization system fail to do justice to a fine Canadian sentiment because, above all, even as symbols, they do not inspire solidarity among regions.

Force of habit seems to have prevented the constitutional debaters from recognizing that the entrenchment of casualty insurance and affirmative action schemes conceived for the regional victims of the old economic order may take for granted the survival of that order and therefore its endurance as a regional irritant and as an impediment to national economic integration and growth. The contradiction is complete in the performance of Premier Hatfield, who, as quoted earlier, has disparaged DREE grants as the badge of New Brunswick's inferior status in the industrial structure yet has long insisted on constitutional commitments to equalization and to the reduction of regional disparities — of which DREE is the primary federal vehicle.

Redistribution and the Resolution

As first introduced, the proposed constitutional amendment in the Resolution read as follows:

EQUALIZATION AND REGIONAL DISPARITIES

31. (1) Without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to

- (a) promoting equal opportunities for the well-being of Canadians;
- (b) furthering economic development to reduce disparity in opportunities; and
- (c) providing essential public services of reasonable quality to all Canadians.

(2) Parliament and the government of Canada are committed to taking such measures as are appropriate to ensure that provinces are able to provide the essential public services referred to in paragraph (1)(c) without imposing an undue burden of provincial taxation.⁸⁰

Subsection (1) was unchanged when the Resolution was returned from parliamentary committee with Mr. Chrétien's motion in February, 1981, although Subsection (2) was revised.

⁸⁰ "Proposed Resolution," *op. cit.*, Schedule B, Constitution Act, 1980, Part II.

Contrary to what one might have expected in line with the Canadian redistribution experience, the disparities to be reduced, according to clauses (a) and (b) above, are not those between per capita earned incomes, employment rates, or other conventional, quantifiable indicators of economic well-being or development but rather disparities of opportunity — a concept that defies any meaningful measurement.⁸¹ Nor are the disparities required to be identified on the basis of interregional comparisons — the word regional appears only in the title.

The latter point so disturbed the Atlantic Provinces Economic Council that it was made the focus of a brief to the Special Joint Parliamentary Committee on the Constitution.

At first, APEC tended to overlook this discrepancy between title and text. . . . Yet the prominence given to so-called "mobility rights" in another part of the Act when coupled . . . suggest an interpretation of disparities in personal terms only. In effect, what is offered by a juxtaposition of these notions of mobility and the reduction of disparities in personal opportunities is simply the right, if it can be called that, of an unemployed person to leave his or her home in search of a job.⁸²

In the brief, APEC advised the Committee that "the basic notion of labour mobility as a solution to regional disparities has been discredited." APEC further suggested the economic reasons why:

Migration, in such numbers as occurred in the 1960's, left the Atlantic Provinces stripped of its youngest and best trained people. The tendency was for the trained and already employed to move. Small communities lost their taxpayers and their already productive people to greater opportunities elsewhere. The result was weaker communities, more unemployment, lessened tax capacity and a lessening of local self-reliance.⁸³

Accordingly, APEC cautioned that "without a distinct commitment to bring opportunities to those who lack them" — the redistribution of wealth to people — "Canada is committing itself, in its own Constitution, to aggravate the very problem of disparity it claims to want to solve."⁸⁴ A specific rewording of the clause proposed by APEC was evidently rejected by the Committee.

A less worrisome explanation for the absence of traditional language in Subsection (1) is that the governments have not ignored the basic irony suggested above and are, in fact, jointly determined to promote equal opportunities for Canadians by eliminating the special economic advantages afforded central Canada or any other

⁸¹ For an examination of the differences between inequality of income and inequality of opportunity, see Arthur M. Okun, *Equality and Efficiency: The Big Trade Off* (Washington, D.C.: Brookings Institution, 1975), especially Chap. 3, pp. 65-87.

⁸² APEC Newsletter, February, 1981, p. 2.

⁸³ *Ibid.*

⁸⁴ *Ibid.*

region, and thereby the roots of regional inequality. The homogeneity that would result across the country begs the question of why such an endeavor would ever have been endorsed by province-builders in the Horatio Alger mold — unless they could not see beyond the tantalizing prospect of Ontario left with merely equal opportunities. Taken to the extreme, equality of opportunity may mean that man-made advantages related to the tariff, for example, would have to be leveled or fully offset along with those wrought by nature and geographical coincidence. Yet the documents from the September, 1980, First Ministers' conference show that at least Quebec, Manitoba, Saskatchewan, and British Columbia used the same form of words in their preferred versions of a constitutional commitment on regional disparities.

More likely there was no meeting of minds on the underlying intent and therefore no truly mutual undertaking. Both province-builders and country-builders probably interpreted the words as they saw fit. The former may have taken the subsection on regional disparities to mean a constitutional mandate to carry on with what they had been doing to counteract perceived inequities in the economic structure, and the latter may have seen the subsection as a more flexible license for the federal government in its role as redistributive agent — perhaps to the point where attention could be shifted away from regional disparities in opportunity to personal disparities, irrespective of region, as the APEC brief suggests.

The language in the subsection on equalization also departs from tradition, but perhaps more so when the Resolution was first introduced, as in Subsection (2) above, than in its final form. At first the proposed amendment duplicated phraseology preferred by British Columbia — the reference to "such measures as appropriate" rather than to equalization payments *per se*.⁸⁵ The federal government may have had its own reasons to prefer this less precise wording. The selection was odd, however, because the B.C. government is known to prefer redistribution across income classes in place of redistribution across regions or provinces and to disapprove of the present equalization system, whereby the federal government makes unconditional grants to provincial governments in an attempt to equalize per capita revenue-raising capacity — or, more specifically, to raise all "have-not" provinces to the national average of per capita revenues. If the means might have been different, at least the intent would have remained roughly the same as at present: to facilitate,

⁸⁵ CICS, Document 800-14/058, *op. cit.*, "Equalization and Regional Development: Government of British Columbia Proposal."

without the imposition of undue provincial tax burdens, provincial government delivery of essential public services of reasonable quality to citizens in every part of the country — although the provision of public services does not actually figure in the present equalization formula.

When the Resolution was returned from committee study in Parliament, however, Subsection (2) had been changed, as noted below:

(2) Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation.⁸⁶

Equalization payments are back, but the objective is stated differently. Here, for obscure reasons, the form of words is exactly that favored in the 1980 negotiations by both Manitoba and Saskatchewan and identified as an element in Quebec's proposed "common stand of the provinces" at the First Ministers' conference in September, even though the commitment remains strictly a federal one.

At this stage it is difficult to say just what the implications of the changes are. According to John Helliwell and Anthony Scott, "this wording makes room for a slightly different [equalization] formula than now in use," but they offer no clues as to the implied scope or direction for change.⁸⁷

Changes in the formula could be desirable, since there is little question that the present equalization program, due to expire in March, 1982, is in need of overhaul.⁸⁸ With successive *ad hoc* changes the integrity of the program has become seriously eroded. Yet it still places unrealistic demands on the federal treasury. The problem lies in the federal government's undertaking to bridge a gap in revenues that are under provincial control. Given the magnitude

⁸⁶ "Motion Tabled in the House of Commons by the Minister of Justice," *op. cit.* (emphasis added).

⁸⁷ John F. Helliwell and Anthony Scott, *Canada in Fiscal Conflict: Resources and the West* (Vancouver: Pemberton Securities, 1981), p. 68.

⁸⁸ For detailed analyses of the equalization system, see, for example, *ibid.* and the series of papers by Thomas J. Courchene, including: "Alternative Equalization Programs: Two-Tier Systems" (co-authored by Glen H. Copplestone), in Richard M. Bird, ed., *Fiscal Dimensions of Canadian Federalism*, Financing Canadian Federation, No. 4 (Toronto: Canadian Tax Foundation, 1980), pp. 8-45; "Energy and Equalization," in Ontario Economic Council, *Energy Policies for the 1980's: An Economic Analysis*, 2 vols. (Toronto, 1980), pp. 103-31; and *Refinancing the Canadian Federation: A Survey of the 1977 Fiscal Arrangements Act* (Montreal: C. D. Howe Research Institute, 1979), pp. 25-41.

of energy revenues that have accrued to Alberta, British Columbia, and Saskatchewan in recent years, the federal tax base has simply been unable to support an endeavor that "burdens the average taxpayer, anywhere, to compensate the other seven provinces for having little or no gas or oil."⁸⁹

In order to cope, the federal government has tinkered with the formula (to diminish its responsibility) and has taken steps, notably under the National Energy Program, to replenish the federal purse — by securing a greater share of oil and gas revenues — and simultaneously to reduce the drain by restricting the revenues of the producing provinces — which, in turn, would have to be partially offset in equalization payments.⁹⁰ "The modest aim of equalizing [essential] provincial services is lost in the glare of the attempt to bring the other provinces closer to the energy revenue of the western provinces," and that effort has also been compromised.⁹¹ In fact, the program nearly attained the level of the absurd in Canadian-style redistribution when Ontario, the only undisputed beneficiary of Confederation whose residents continue to enjoy income levels among the highest in the country, itself became technically eligible for an equalization grant as a "have-not" province. Whether to salvage the "cultural" virtue of the program or to save the federal government money, the formula was modified to arrange for the disqualification of Ontario or of any other province unless, in the year of eligibility, provincial per capita income is below the national average and has been for the two preceding years.⁹²

Although the equalization program, in its broad outline, is recognized as overly ambitious, the proposed constitutional amendment could conceivably commit the federal government to something even more far-reaching in "making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation."

If interpreted literally and if strictly enforceable, this amendment could mean a federal undertaking to enable provincial treasuries

⁸⁹Helliwell and Scott, *op. cit.*, p. 49.

⁹⁰In 1977, for example, the system was modified so that only 50 percent of all natural resource revenues entered the formula for calculating equalization payments. Then, on February 5, 1981, Parliament passed Bill C-24, enabling provincial revenues from the sale of Crown leases to be (retroactively) phased out of the formula.

⁹¹Helliwell and Scott, *op. cit.*, p. 49.

⁹²The saving would have been an estimated \$567 million between fiscal years 1977/78 and 1979/80 (see the Hon. Frank S. Miller, *Ontario Budget, 1980* [Toronto: Ministry of Treasury and Economics, 1980], Budget Paper A, "Equalization and Fiscal Disparities in Canada").

to provide their residents with a "reasonably comparable" product, probably according to standards set by the more affluent provinces and the more progressive provincial administrations. A provincial government that fancied an enriched service offered by another would conceivably be entitled to receive "sufficient revenues" from the federal government to offer it too, as long as "reasonably comparable levels of taxation" were maintained between the provinces in question. The objective of the equalization payments is not related to the delivery only of *essential* public services as in the current program and in the earlier formulation of the constitutional amendment. Moreover, the amendment seems to imply no responsibility on the part of the provincial governments to finance expenditures by borrowing (or, indeed, from other sources of revenue beyond taxation) except as may be required to pay for public services that remain incomparable, at least for a time. The federal treasury again would pick up the tab for flows largely beyond its control — although the power of the purse could possibly be used to bring more uniformity to provincial public services, consistent with the country-building theme of national standardization.

At present there is no evidence that the foregoing is anything more than a plausible interpretation of the constitutional commitment — but if it becomes constitutional law, there could be a very long time for plausible interpretations to catch on. Federal and provincial officials who are now preparing for the renegotiation of the five-year agreement on the existing equalization program apparently do not think that the amendment in the Resolution implies a dramatic change in approach. They point out that current program objectives include references to both fiscal need (to provide essential services) and to fiscal capacity but that only the latter actually finds its way into the formula; the federal constitutional commitment could well be implemented in the same way, presumably for as long as it stands.

Had province-builders and country-builders been intent on reconciling their conflicting aims in the constitutional negotiations, the agenda item on Equalization and Regional Disparities would have been an appropriate place to begin. They apparently did not do this and may have instead simply staked out and secured a larger arena.

Conclusions

The concept of "province-building versus country-building" helps to typify the competition for power between governments in Canada.

The two pursuits are not compatible in their present forms except in the case of Ontario, which is in a position to win either way and thus enjoys the best of Canadian federalism. Accordingly, the constitutional debate during the past three years has not routinely pitted all provincial governments against the federal government but, instead, province-builders against country-builders and regions against the center shared by Ontario and Ottawa.

The foregoing examination of the constitutional negotiations has shown that province-builders are seeking to expand their constitutional authority and to achieve greater decentralization of power in Canada. On the whole, country-builders are not trying to accomplish a reciprocal shift in the balance through greater centralization of power. Rather, they seem more intent on blunting the provincial offensive and on keeping provincial maneuvering room within bounds that, in particular, permit more national standardization and safeguard against any erosion in the federal government's role in the final determination of the "national interest" and national policy. Province-builders apparently conclude that the decentralization of power has not gone nearly far enough in Canada. Country-builders act as though they think it has — although not beyond the point where power needs to be recouped by the central government itself. Over the 1978-81 period the federal government, under the Liberals, has become tougher in its stand, however, as evidenced chiefly by the overall shift in the constitutional agenda away from province-building items; by the harder line taken in negotiations on Resource Ownership and Interprovincial Trade — the economic rallying cry of province-builders; and, finally, by the nature of the proposed Resolution on the Constitution.

Therefore, while the antagonism between province-builders and country-builders is reciprocal, the most aggressive opposition to the *status quo* has come from the former. Province-building outside of central Canada rejects the heartland-hinterland view of the national political economy and attempts to counteract federal economic policies and actions that transcribe that view. The federal government is considered the champion of the heartland because the protected industrial core is also roughly congruent with its prime base for popular electoral support. As a consequence, province-builders argue that the federal government cannot be trusted to deal even-handedly with all regions of the nation in exercising its powers under the Constitution and especially in distributing the economic benefits of Confederation equitably across the land. The seemingly parochial character of the federal government is so much at odds with the

model of representational equality symbolized by the ten provincial governments that province-builders are moved to introduce their level of government in the decision-making process that defines the "national interest."

Near the close of the First Ministers' conference on the Constitution in September, 1980, there occurred an exchange that crystallizes the basis of the clash between province-builders and country-builders. According to Prime Minister Trudeau,

there is one view which holds that national Canadian policies . . . ought to be what results from each province acting independently to maximize its own self-interest. . . . The other view is that there is a national interest which transcends regional interests . . . that view goes so far as to say that when there is a conflict between the national interest and the provincial interest, the national interest must prevail because Canada is more than the sum of its parts, more than the sum of ten provinces, more than the sum of regional economies and that is my view.

Premier Blakeney responded by saying:

I don't want you or the public to think that the provinces or at least the Province of Saskatchewan . . . takes the position that there is not a national interest to be protected. We are strongly of the view that there is a national interest to be protected. . . . I think *our difference may well be with respect to how the national interest is defined and how the national consensus should be arrived at*. I do not believe that the national interest is represented by a consensus of all provincial governments. . . . Nor, however, do I believe that the national interest is to be ascertained by the majority will of Canadians. . . . The essence of Canada is . . . that on major matters we need a double majority. We need the majority of citizens as expressed by the *popular will* in the House of Commons and we need a majority, however defined, *of the regional will*. This is the essence of a federal state.⁹³

If the people in the West, Quebec, the Maritimes, and Newfoundland believed that Parliament and the other central institutions of government were actively and faithfully responsive to the regional will as well as to the popular will in Premier Blakeney's concept of a federal state, the provinces would not be relied upon, as they now are, to define the regional will.

At its roots the constitutional debate is about the institutions of government and their respective powers. The powers have received overwhelming attention, perversely so, given the evidence that important obstacles to agreement have been institutional. It appears that additional constitutional authority is sought at the provincial level to compensate for, or to take advantage of, institutional failure at the federal level. The real choice, therefore, is between decentralization of power and reform of the central institutions, notably to improve regional representation. Until the latter receives its share of

⁹³ Unofficial transcript of First Ministers' Conference on the Constitution, Ottawa, September 13, 1980 (emphasis added).

direct attention, the constitutional debate not only will continue but will continue to be materially misdirected.

Other Possible Remedies

The alternative to decentralization of constitutional powers, and potentially the better approach if the forces of disunity are to be contained, lies in the reform of federal institutions.

Under federalism all Canadians have the right to expect to have, and to see, their interests represented and reflected in the discharge of responsibilities by both levels of government. If the existing institutional problem can be put in a nutshell: the federal government is giving federalism a bad name nearly everywhere except in Ontario. People outside the prime electoral base for federal support are, or feel they are, being deprived of that second level of representation. Provincial governments in those areas have stepped into the breach, trying to be all things to their constituents — sovereign governments in matters coming within their jurisdiction, but also regional spokesmen on national matters for which Parliament may have ultimate responsibility.

While it is difficult to fault the provincial governments for having done so, an examination of the constitutional debate suggests that they have not actively promoted constitutional reform of the sort that would cause the central institutions of government to become more sensitive to regional perspectives. Instead, they have shown a preference for changes in the division of powers that would shift more responsibility to their level of government. Where the provincial governments have indeed advocated such institutional changes — for example, in the case of British Columbia's persistent call for a reformed Senate — the specific proposals invariably imply an extension of the long arm of provincial governments into the central government in ways that would reinforce their own role as leading regional representatives.⁹⁴ This would mean that large numbers of Canadians would remain deprived of that second level of representation under federalism now granted most clearly to the people of Ontario.

Owing to the non-governmental debate on the Constitution, a variety of proposals have been made that show how the good name of federalism might be restored. Proportional representation in the House of Commons has been suggested. This would bring the party distribution of Members of Parliament representing any particular

⁹⁴ This helps to explain why, as an agenda item, the Senate appears in Table 1 under province-building rather than under country-building.

province or region more in line with the proportion of the popular vote received. Reform of the "upper chamber" of Parliament, especially an elected Senate in place of one whose members are appointed by either the federal or provincial Cabinets, has been advocated.⁹⁵ Prime Minister Trudeau has said that a committee should be set up in the 1981-82 session of Parliament to study these possibilities, but he has also acknowledged that his government's Resolution, in giving the Senate an absolute veto on constitutional reform, may have foreclosed that particular remedy.⁹⁶ "If everyone wants to reform the Senate but the Senate, it won't be reformed."⁹⁷

In light of the very considerable power of the federal public service, the list might be extended to include ways of increasing the regional sensitivity of that bureaucracy, particularly of those in its ranks who help formulate government policy. A former long-time public servant has written that "in the Ottawa bureaucracy, the 'nation' is perceived as the supreme entity, with the regions somewhat unruly junior subdivisions imprecisely represented by the provinces" and has gone on to suggest that the federal public service "should be a separate item on the agenda of the debate on the future of Confederation."⁹⁸

Dismissing this sort of criticism, the Hon. Marc Lalonde has complained that he is

tired of hearing that the national interest is some abstract idea concocted by a clutch of Ottawa mandarins to further their own ends . . . [and] tired of being told that Ottawa is a place apart, far removed from the concerns of the average Canadian.⁹⁹

⁹⁵ The notion of an elected Senate has (perhaps undeservedly) acquired connotations of "creeping republicanism." Although an elected Senate could diminish "responsible government" at the federal level, the real question is whether this price is not worth paying for the benefit of greater unity and of development as a nation. After all, an entrenched Charter of Rights also diminishes responsible government, at both levels.

⁹⁶ However, the Prime Minister apparently sees proportional representation in the House of Commons and greater regional representation in the Senate as substitutes instead of complements (see the "Transcript of Question and Answer Session, Prime Minister and Students of Osgoode Hall Law School," York University, Toronto, February 5, 1981, p. 18). There is no logical reason for this view, since the House would remain the popular chamber, constituted on the basis of "representation by population"; only the geographical distribution of Party representatives would change, so that, for example, more Liberals would be elected in the West and more Conservatives in Quebec.

⁹⁷ *Ibid.*, p. 19.

⁹⁸ Gordon Stead, "Southern Ontario Thinking Permeates Federal Policy-Making — with What Implications for Confederation?," *Vancouver Sun*, January 18, 1978. This article is a condensed version of a paper prepared for a seminar at Harvard University's Center for International Affairs.

⁹⁹ See "Notes for an Address by the Hon. Marc Lalonde to the Canadian Club," Montreal, December 15, 1980, p. 2.

With all due respect to the Minister, there can be no question that policy-makers are influenced by the environment in which they find themselves, and in Canada the senior officials of the central government reside snugly within the economic and electoral center of the country.¹⁰⁰ Little wonder, then, that the interests of the heartland permeate their thinking. For it to be otherwise, public servants would have to make a conscious and concerted effort to prevail against the inexorable conditioning process. There are no rewards or requirements for regional awareness, however, and limited opportunities to "return to the ridings," as elected representatives do, for a fresh reminder of local viewpoints.

The federal government has instituted bilingualism requirements to enable French-speaking Canadians to work in the public service. Through their participation (and helped by the proximity to Quebec), they have doubtless increased the bureaucracy's awareness of Canada's major linguistic cleavage. Something similar — such as regional experience requirements for senior government positions — could be done to instill an appreciation for Canada's regional diversity.

The old National Policy, which embodies the heartland-hinterland concept of Canada's economic structure, can also be considered an institution of the central government. It no longer serves, as it once did, as a force for national cohesion — quite the contrary. A "new national policy," if it could genuinely be called that, is needed, in the words of Prime Minister Trudeau himself, "to strengthen Canada by achieving more balanced and diversified regional growth throughout the country."¹⁰¹ The need for "fundamental changes" was acknowledged by him in 1973 at the Western Economic Opportunities Conference. Failing concerted federal action to this end, province-builders will continue to try, separately, to bring about greater economic balance and diversification in their own favor, with disruptive consequences for the national economy and national unity, as noted earlier.

If there appears to be little prospect that the federal government will initiate significant institutional change of this general type and direction, there is another kind of institutional remedy potentially

¹⁰⁰ According to an estimate supplied by the Public Service Commission of Canada, 76.8 percent of public servants at the senior levels of "PM7 Equivalent and Above" are presently located in the National Capital Region (Ottawa-Hull). Only 21.9 percent are located elsewhere in Canada, with the remainder, 1.3 percent, posted outside.

¹⁰¹ Western Economic Opportunities Conference, July, 1973, *Verbatim Record and Documents* (Ottawa: Supply and Services Canada, 1977), p. 18.

available in the organization of the provinces themselves. Pressure might be exerted on provincial governments to recognize the dangers and costs of province-building pursued independently of one another. They might be urged to take collective, constructive action to strive to minimize the ill effects and to shoulder together the challenge of country-building in a form not so much at odds with regional or provincial interests.

Much could be done within areas of provincial jurisdiction to harmonize government laws and practices, to replace barriers with reciprocity, and to formulate shared goals in matters of education, health, pensions, agriculture, transportation, labor, and economic development. Collectively, the provinces would have to talk less and do more about cooperation, however. The popular wisdom in Canada holds that provincial governments cannot agree among themselves or can do so only when opposing the federal government; this contention largely remains to be disproved.

One great opportunity for interprovincial cooperation beckons precisely in the redistributive function that was the object of controversy in the constitutional negotiations. If, for one reason or another, the resource-rich provinces continue to distrust the federal government as the primary agent for redistribution and the poorer provinces see no salvation in federal economic development policies, there is nothing to prevent their assuming jointly some of the responsibility for the function. With natural resources under substantial provincial ownership and control — except for the offshore, where, on the West Coast, ownership is federal and, on the East Coast, arguable — provincial governments collectively have the means at hand to form their own arrangement for sharing the use of resource revenues through good times and bad. This could serve as a supplement to a federal equalization program that might still redistribute federal tax dollars but not try to correct for inequalities in resource endowments.¹⁰²

Of course, as this example points out, there is no way that the prerogatives of Parliament and the existence of the federal government can be ignored or dismissed. Nor can the provinces be expected to fit national shoes perfectly. But the provincial level of government in Canada also stretches from sea to sea, and if the good name of federalism is not restored by the federal government, the onus is on

¹⁰² An interprovincial redistribution scheme would be tantamount to a second tier in two-tier equalization programs, such as those that have been proposed by a number of economists as a way to rationalize the function. For a discussion of some specifics, see Helliwell and Scott, *op. cit.*, and the series of articles by Courchene referred to in note 88.

the other partners in federalism collectively to demonstrate a new form of country-building. If Canada's progress as a nation is not to be stalled altogether by conflict, the corresponding challenges are for the federal government to adopt a more truly national perspective in the exercise of the constitutional powers accorded Parliament and for the provinces to show that the sum of the parts, while perhaps less than the whole, can be not a bad approximation of it.

Appendix

PART VII AMENDMENT TO THE CONSTITUTION ACT, 1867

Amendment
to
Constitution
Act, 1867

56. The *Constitution Act, 1867* (formerly named the *British North America Act, 1867*) is amended by adding thereto, immediately after section 92 thereof, the following heading and section:

"Non-Renewable Natural Resources, Forestry Resources and Electrical Energy

Laws respecting non-renewable natural resources, forestry resources and electrical energy

92A. (1) In each province, the legislature may exclusively make laws in relation to

(a) exploration for non-renewable natural resources in the province;

(b) development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom; and

(c) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy.

Export from provinces of resources

(2) In each province, the legislature may make laws in relation to the export from the province to another part of Canada of the primary production from non-renewable natural resources and forestry resources in the province and the production from facilities in the province for the generation of electrical energy, but such laws may not authorize or provide for discrimination in prices or in supplies exported to another part of Canada.

Authority
of
Parliament

(3) Nothing in subsection (2) derogates from the authority of Parliament to enact laws in relation to the matters referred to in that subsection and, where such a law of Parliament and a law of a province conflict, the law of Parliament prevails to the extent of the conflict.

Taxation of
resources

(4) In each province, the legislature may make laws in relation to the raising of money by any mode or system of taxation in respect of

(a) non-renewable natural resources and forestry resources in the province and the primary production therefrom, and

(b) sites and facilities in the province for the generation of electrical energy and the production therefrom, whether or not such production is exported in whole or in part from the province, but such laws may not authorize or provide for taxation that differentiates between production exported to another part of Canada and production not exported from the province.

"Primary
production"

(5) The expression "primary production" has the meaning assigned by the Sixth Schedule.

Existing
powers or
rights

(6) Nothing in subsections (1) to (5) derogates from any powers or rights that a legislature or government of a province had immediately before the coming into force of this section."

Idem

57. The said Act is further amended by adding thereto the following Schedule:

"THE SIXTH SCHEDULE

Primary Production from Non-Renewable Natural Resources and Forestry Resources

1. For the purposes of section 92A of this Act,
(a) production from a non-renewable natural resource is primary production therefrom if

(i) it is in the form in which it exists upon its recovery or severance from its natural state, or

(ii) it is a product resulting from processing or refining the resource, and is not a manufactured product or a product resulting from re-

fining crude oil, refining upgraded heavy crude oil, refining gases or liquids derived from coal or refining a synthetic equivalent of crude oil; and

(b) production from a forestry resource is primary production therefrom if it consists of sawlogs, poles, lumber, wood chips, sawdust or any other primary wood product, or wood pulp, and is not a product manufactured from wood."

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